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*Commissioner Ness sworn in on June 3, 1994.
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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

International Telecharge, Inc.,
d/b/a Oncor Communications, Inc.,
Complainant,

v.

BellSouth Corporation, File No. E-93-065
BellSouth Telecommunications, Inc.,
Defendants.

ORDER

Adopted: September 30, 1994; Released: October 17, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On February 16, 1993, International Telecharge, Inc. d/b/a/ Oncor Communications, Inc. (ITI/Oncor) filed the above-captioned formal complaint against BellSouth Corporation and its operating company, BellSouth Telecommunications, Inc. (BellSouth). The complainant alleged that BellSouth violated, inter alia, Sections 201(b), 202(a), and 203, of the Communications Act of 1934, 47 U.S.C. §§ 201(b), 202(a), and 203. On September 22, 1994, the parties filed a joint motion to dismiss with prejudice, stating that they had reached agreement regarding the allegations contained in the complaint.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI COMMUNICATIONS CORPORATION,
Complainant,

v.

AMERICAN TELEPHONE and TELEGRAPH COMPANY,
Defendant.

File No. E-94-62

ORDER

Adopted: September 30, 1994; Released: October 17, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On April 7, 1994, MCI Telecommunications Company (MCI) filed the above-captioned formal complaint against the American Telephone and Telegraph Company (AT&T). The complainant alleged that AT&T had implemented two tariffed promotional offerings that were unlawfully discriminatory in violation of Sections 201(b) and 202(a) of the Communications Act of 1934, 47 U.S.C. §§ 201(b) and 202(a). AT&T denied the allegations.

2. On August 5, 1994, MCI filed a Notice of Withdrawal of Complaint, stating that it did not intend to further prosecute the above-captioned complaint as the tariffs in question had been amended by AT&T effective April 25, 1994.

3. We are satisfied that dismissing the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

4. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

ANN RICHARDS, CLAYTON WILLIAMS,
JIM MATTOX, TOM LUCE, KENT HANCE,
ROBERT MOSBACHER, JR., TOM PHILLIPS,
and BUSTER BROWN

Against Channel 12 of Beaumont, Inc.,
Licensee of Station KBMT(TV),
Beaumont, Texas

ORDER

Adopted: October 5, 1994; Released: October 17, 1994

By: Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it: (a) a Complaint, filed January 1, 1993, by Ann Richards, Clayton Williams, Jim Mattox, Tom Luce, Kent Hance, Robert Mosbacher, Jr., Tom Phillips, and Buster Brown (collectively "Complainants") against Channel 12 of Beaumont, Inc. ("Channel 12"), licensee of Station KBMT(TV), Beaumont, Texas; and (b) an Answer, filed March 9, 1993, by Channel 12. Complainants were legally qualified candidates during the 1990 elections for various public offices in Texas.[1]

2. Complainants allege that Channel 12 systematically overcharged them for the use of KBMT(TV) during the 1990 primary and general elections, in violation of the lowest unit charge ("LUC") requirements of § 315(b) of the Communications Act of 1934, as amended.[2] Complainants also allege that Channel 12 engaged in rate discrimination, in violation of § 73.1941(e) of the Commission's Rules.[3]

3. For the reasons set forth below, it is concluded that Richards, Williams, and Mattox have established a *prima facie* case that they were overcharged by Channel 12 for the use of KBMT(TV). The other individuals on whose behalf the Complaint was filed have failed to establish a *prima facie* case of overcharging. None of the Complainants has established a *prima facie* case of rate discrimination.

I. PRIMA FACIE ANALYSIS

4. This matter is properly before the Bureau pursuant to *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) ("*Declaratory Ruling*"). The *Declaratory Ruling* set forth specific procedural requirements governing § 315(b) complaints.

5. In order to invoke the Commission's enforcement procedures, complainants who allege a violation of § 315(b) are required to make a *prima facie* showing of such violation. At a minimum, this showing must consist of a "short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513, ¶ 22. A complainant must describe the specific factual basis for its belief that a station has committed a violation, rather than, for example, merely making a general allegation that a station has overcharged candidates. *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith*, 7 FCC Rcd 6661, 6662-6663 (MMB 1992), *modified*, 7 FCC Rcd 7199 (MMB 1992), *rev. granted in part and denied in part*, 8 FCC Rcd 131, 132 (1992) ("*Lawton Chiles*"). A complainant may make a *prima facie* case by using generally-available industry or statistical data on average rates to show that the rate paid by a candidate was higher than the average rate charged by the station for the same class of time. *Declaratory Ruling*, 6 FCC Rcd at 7521, n.47. The licensee may submit an answer to the complaint within ten days.

6. If, upon review of the complaint and answer (if filed), the Bureau determines that the complainant has established a *prima facie* case, the Bureau will issue an order giving the parties the opportunity to select one of two dispute procedures for resolving the complaint: mediation or disposition by the Bureau, subject to review by the Commission. *Declaratory Ruling*, 6 FCC Rcd at 7513, ¶ 22.

---

[1] Ms. Richards and Messrs. Williams, Mattox, Luce, and Hance were legally qualified candidates during the 1990 elections for the public office of Governor of Texas. Mr. Mosbacher, Jr. was a legally qualified candidate during the 1990 elections for the public office of Lt. Governor of Texas. Mr. Phillips was a legally qualified candidate during the 1990 elections for the public office of Chief Justice of Texas. Mr. Brown was a legally qualified candidate during the 1990 elections for the public office of Attorney General of Texas.

[2] Section 315(b) provides as follows:

> (b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed
>
> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general election or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; andx
>
> (2) at any other time, the charges made for comparable use of such station by other users thereof.

[3] Section 73.1941(e) (formerly § 73.1940(c)), states in pertinent part:

> (e) *Discrimination between candidates.* In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subjects any such candidate to any prejudice or disadvantage. . . .

Under either procedure, the complainant is entitled to limited discovery, subject to specific conditions set forth in the Bureau's order. *Declaratory Ruling*, 6 FCC Rcd at 7513, ¶ 23.

Overcharge Allegations

7. Turning to the instant case, Complainants allege that Channel 12 violated the LUC requirements of § 315(b) of the Communications Act of 1934, as amended, by charging rates for political advertisements on KBMT(TV) which exceeded "SCOOP"-based rates. SCOOP, the acronym for *Spot Cost Outlook and Projections*, a product of *Media Market Guide*, is a compilation of generally available statistical data on average rates charged by television stations. In support, Complainants rely on the Declaration, under penalty of perjury, of Leslie J. Edelstein ("Edelstein"). Edelstein describes herself as familiar with the practices and terminology involved with the sale of political advertising.

8. Edelstein states that she compared the SCOOP-based rate for each daypart on KBMT(TV)[4] during the first, second, and fourth calendar quarters of 1990[5] with the rates actually charged to Ms. Richards and Messrs. Williams and Mattox.[6] Edelstein's analysis did not include any reference to the purchase of air time for political advertisements by Messrs. Luce, Hance, Mosbacher, Jr., Phillips, or Brown.

9. Edelstein's analysis revealed the following:

First Quarter 1990		2/12/90-2/14/90	3/7/90-3/12/90
Daypart	SCOOP Rate ($)	Williams($)	Mattox ($)
7-9am	44	95	95
9-10am	46	95	
4:30 -5pm	42		95
5-5:30 pm	84		125
6-6:30 pm	224		310
10-10:30 pm	297	325	
10:30-11pm	175	225	225

Second Quarter 1990		4/3/90-4/9/90
Daypart	SCOOP Rate ($)	Mattox ($)
9-10am	56	95
5-5:30 pm	120	125
10:30 -11pm	140	200
11-11:30 pm	140	150

Fourth Quarter 1990		10/17/90-10/23/90
Daypart	SCOOP Rate ($)	Richards ($)
7-9am	72	80
6-6:30 pm	264	300
10:30 -11pm	168	225

According to Complainants, these figures demonstrate that Channel 12 overcharged these candidates by significant amounts for the purchase of political advertisements on KBMT(TV), in violation of the Commission's LUC requirements.

10. Channel 12 maintains that Complainants have not established a *prima facie* case of overcharging because Edelstein's analysis is flawed.[7] Specifically, Channel 12 argues that SCOOP does not provide an average rate for each of the particular dayparts referenced in Edelstein's analysis. For example, according to Channel 12, SCOOP provides a rate for the early morning period from 6:00 a.m. to 9:00 a.m., not 7:00 a.m. to 9:00 a.m., as Edelstein's analysis suggests. Consequently, Channel 12 questions Edelstein's methodology in deriving the average rates upon which Complainants rely. Furthermore, because SCOOP-based averages are, according to Channel 12, based on dayparts which are generally longer in duration than each of KBMT(TV)'s dayparts, Channel 12 claims that the SCOOP-based rates in Edelstein's analysis are arbitrarily low and, consequently, unreliable.

11. Channel 12 also claims that Edelstein's analysis is flawed because it compares SCOOP-based average rates with specific rates charged by KBMT(TV), rather than with average rates charged by KBMT(TV). Channel 12 maintains that in a majority of dayparts during each of the relevant calendar quarters, KBMT(TV)'s average rates were lower than the SCOOP-based market averages. According to Channel 12, the actual, higher rates charged to specific individual candidates was a function of the class of time which they chose to purchase on KBMT(TV), as reflected in KBMT(TV)'s political rate cards.

12. As noted above at ¶ 5, the Commission has expressly endorsed the use of generally available industry or statistical data on average rates to establish a *prima facie* case of a LUC violation. *Declaratory Ruling*, 6 FCC Rcd 7511, 7521, n.47 (1992). The SCOOP rates upon which Complainants rely unquestionably constitute an example of the type of generally-available industry or statistical averages contemplated by the Commission. *See, Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith*, 7 FCC Rcd 6661 (MMB 1992). Therefore, Channel 12's arguments challenging the propriety of relying on SCOOP data and comparing that data to specific rates charged to candidates is rejected as inconsistent with the Commission's prior, affirmative statements on the subject.

13. Based on an analysis of the information presented, we believe that Ms. Richards and Messrs. Williams and Mattox have established a *prima facie* case of overcharging by Channel 12. Specifically, they have shown that on multiple occasions, the actual rates that Channel 12 charged them for political advertisements on KBMT(TV) exceeded

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[4] Edelstein multiplied the average SCOOP rate for a given daypart in the Beaumont market by the actual (Arbitron) rating for that daypart on KBMT(TV). The result is a station-specific SCOOP-based rate.

[5] These calendar quarters encompass the relevant 45-day period preceding the primary election and the relevant 60-day period preceding the general elections during which the Commission's LUC requirements are applicable. *See* § 315(b) of the Communications Act of 1934, as amended.

[6] Not all the candidates purchased air time in the same or all dayparts.

[7] Channel 12 also maintains that because of "laches," Complainants' allegations "hardly deserve the weight and attention which would be accorded to a timely filing." *See* Answer, at p. 2. In order to avoid resolving complaints based on a stale record, the *Declaratory Ruling*, 6 FCC Rcd at 7521, n.46, requires that LUC complaints be filed "in a timely manner." Channel 12 does not suggest that the timing of the complaint's filing, less than three years after the election in question, will lead to our resolving this matter based on a stale record. Accordingly, we see no basis to afford any less weight and attention to this complaint than we would to others.

station-specific SCOOP-based average rates. In some instances, the actual rate charged was more than double the SCOOP-based average.

14. Channel 12's argument, that Edelstein's analysis is flawed because the SCOOP dayparts do not coincide with KBMT(TV)'s dayparts, is rejected for two reasons. First, Channel 12's claim is entirely unsupported. In particular, Channel 12 provides no evidence in the form of sample SCOOP materials from *Media Market Guide* which would facilitate a comparison of SCOOP dayparts with KBMT(TV) dayparts. Furthermore, in determining whether a *prima facie* case has been established, the Bureau is required to accept as true all of Complainants' allegations and to draw all inferences in Complainants' favor. *Declaratory Ruling*, 6 FCC Rcd 7511, 7513 (1992). Thus, for the purpose of determining whether further inquiry is warranted, it must be assumed, absent evidence to the contrary, that Edelstein accurately evaluated the available data, and her methodology in deriving the average rates for each daypart was sound.

15. Although KBMT(TV)'s political rate cards indicate that Messrs. Williams and Mattox purchased non-preemptible time on the occasions referenced in Edelstein's analysis, Channel 12 does not provide any evidence to support a finding that those rates were the station's LUC for non-preemptible rates. In particular, Channel 12 makes no showing as to the non-preemptible rates charged to KBMT(TV)'s most favored commercial advertisers. Similarly, there is no evidence presented by Channel 12 that the rates charged to Ms. Richards for preemptible time on KBMT(TV) were the LUC for that class. In sum, it is concluded that Channel 12 has failed to rebut Complainants' claims of overcharging. *See, Lawton Chiles, Bob Martinez, and Bill Nelson*, 8 FCC Rcd 131, 132, n.13 (1992).

16. While it is concluded that Ms. Richards and Messrs. Williams and Mattox have established a *prima facie* case of overcharging, the same cannot be said of the remaining persons on whose behalf the Complaint was filed. Edelstein's analysis provides no reference to, or evaluation of, the rates charged to Messrs. Luce, Hance, Mosbacher, Phillips, or Brown. Although Mosbacher provides invoices to support his claim of overcharging, the invoices do not establish a *prima facie* case of overcharging on a significant number of instances. Consequently, it is concluded that these individuals have failed to state a basis on which relief may be granted and the Complaint as to them, to the extent they allege overcharging by Channel 12, is dismissed.

Rate Discrimination Allegation

17. Complainants allege that Channel 12 charged different rates to different candidates for political advertisements in the same daypart, in violation of § 73.1941(e) of the Commission's Rules. In support, Complainants provide the following examples:

Candidate	Date	Daypart	Rate Charged ($)
Williams	2/12/90	10:30-11:00 p.m.	225
Mattox	2/13/90	10:30-11:00 p.m.	90
Williams	2/13/90	10:00-10:30 p.m.	325
Mattox	2/17/90	10:00-10:30 p.m.	100
Richards	10/18/90	10:30-11:00 p.m.	225
Mosbacher	10/18/90	10:30-11:00 p.m.	90
Richards	10/13/90	10:00-10:30 p.m.	250
Mosbacher	10/13/90	10:00-10:30 p.m.	125
Richards	10/20/90	10:00-10:30 p.m.	250
Mosbacher	10/20/90	10:00-10:30 p.m.	125
Richards	10/30/90	6:00-6:30 p.m.	300
Mosbacher	10/30/90	6:00-6:30 p.m.	140
Richards	10/29/90	6:30-7:00 p.m.	225
Mosbacher	10/29/90	6:30-7:00 p.m.	95
Richards	11/2/90	7:00-9:00 a.m.	80
Mosbacher	11/2/90	7:00-9:00 a.m.	25
Brown	10/30/90	7:00-9:00 a.m.	120
Richards	11/5/90	6:00-6:30 p.m.	300
Mosbacher	11/5/90	6:00-6:30 p.m.	400
Brown	11/5/90	6:00-6:30 p.m.	500

18. In response, Channel 12 maintains that KBMT(TV) charged candidates the precise rates that appeared on the station's political rate cards which were in effect in 1990. Station KBMT(TV)'s political rate cards during the relevant 1990 calendar quarters contained six classes of time: Class 1 (the most expensive) was non-preemptible; Class 6 (the least expensive) was immediately preemptible; and Classes 2 through 5 were preemptible with notice and varied only with respect to the probability of preemption.

19. According to Channel 12, the apparent discrepancy between the rates charged to the candidates is attributable to the fact that different candidates purchased different classes of time. Indeed, a review of KBMT(TV)'s rate cards suggests that the rate which a candidate paid was a function of the class of time each purchased:[8]

[8] The Bureau derived each class of time below by comparing the date, daypart, and rate charged to each candidate, as provided by Complainants, with KBMT(TV)'s rate cards, as provided by Channel 12.

Candidate	Date	Daypart	Rate Charged($)	Class
Williams	2/12/90	10:30-11:00 p.m.	225	1
Mattox	2/13/90	10:30-11:00 p.m.	90	6
Williams	2/13/90	10:00-10:30 p.m.	325	1
Mattox	2/17/90	10:00-10:30 p.m.	100	6
Richards	10/18/90	10:30-11:00 p.m.	225	3
Mosbacher	10/18/90	10:30-11:00 p.m.	90	6
Richards	10/13/90	10:00-10:30 p.m.	250	3
Mosbacher	10/13/90	10:00-10:30 p.m.	125	6
Richards	10/20/90	10:00-10:30 p.m.	250	3
Mosbacher	10/20/90	10:00-10:30 p.m.	125	6
Richards	10/30/90	6:00 -6:30 p.m.	300	3
Mosbacher	10/30/90	6:00-6:30 p.m.	140	6
Richards	10/29/90	6:30 -7:00 p.m.	225	3
Mosbacher	10/29/90	6:30-7:00 p.m.	95	6
Richards	11/2/90	7:00-9:00 a.m.	80	3
Mosbacher	11/2/90	7:00-9:00 a.m.	25	6
Brown	10/30/90	7:00-9:00 a.m.	120	1
Richards	11/5/90	6:00-6:30 p.m.	300	3
Mosbacher	11/5/90	6:00-6:30 p.m.	400	2
Brown	11/5/90	6:00-6:30 p.m.	500	1

20. In 1990, the relevant period in question, the Commission's policy, as first set forth in a 1988 *Public Notice*, was to recognize only one class of immediately preemptible time for LUC purposes. *See Public Notice*, 4 FCC Rcd 3823, 3824 (1988). In describing immediately preemptible time, the *Public Notice* stated that "[p]reemptibility enables the broadcaster to 'bump' an advertiser paying a lower preemptible rate in favor of an advertiser paying a higher preemptible rate. . . ." *Public Notice*, 4 FCC Rcd at 3823. However, the *Public Notice* further stated that preemptible with notice time constituted a separate class of time for lowest unit charge purposes. Preemptible with notice time was described as "an announcement that becomes non-preemptible if not preempted by a certain date. . . ." *Public Notice*, 4 FCC Rcd at 3824. Any doubt about the propriety of multiple classes of preemptible time -- with or without notice -- was eliminated in *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 691 (1991). Therein, the Commission determined that its policy of treating all immediately preemptible time as a single class "does not appear to effectuate what Congress envisioned when it enacted § 315(b)." In concluding that its policy on classes of time "should be changed to reflect more accurately the realities of the advertising marketplace," the Commission adopted (and for the first time, codified in its rules) a new policy of allowing broadcasters to "establish and define their own reasonable classes of immediately preemptible time." For the same reasons, the Commission also determined that broadcasters should be allowed to establish reasonable classes of preemptible-with-notice time.

21. It thus appears that during the election campaigns of 1990 which are at issue here there were no rules or policies which expressly precluded the type of "grid" card that Channel 12 utilized. Channel 12's rate card contained a single class of immediately preemptible time, a practice which was specifically permitted in 1990, and it contained four classes of what it termed "preemptible-with-notice time." Although this preemptible with notice time had some characteristics of immediately preemptible time, as described in the 1988 *Public Notice*, because advertisers paying higher prices had a lower probability of preemption, it also had some characteristics of the preemptible with notice time, as described in the *Public Notice*, in that advertisers had a right to receive prior notice before preemption.

22. Given the unsettled nature of the Commission's position on multiple classes of preemptible-with-notice time in 1990 and the subsequent clarification of its policy on classes of time generally in *Codification of the Commission's Political Programming Policies*, we do not find that Complainants have established a *prima facie* case of overcharging in any of the above instances where candidates who purchased preemptible time (Classes 2 through 6) in the same daypart were charged disparate amounts.

23. Moreover, even if we were to conclude that the 1988 *Public Notice* established that the classes of time used by Channel 12 were immediately preemptible, rather than preemptible with notice, our disposition of this matter would be no different. The 1988 *Public Notice* was not binding law, but was a statement of general policy that could be challenged in any subsequent proceeding such as this one, in which it was applied. In considering such a challenge, we note, as discussed above, that the Commission has determined that the 1988 policy did not appear to effectuate congressional intent underlying Section 315(b). Further, no equitable factors suggest we should, nevertheless, allow Complainants to receive the benefits of that policy. For example, the 1988 *Public Notice* did not reflect any long-standing Commission policy, nor is there any basis to believe that the candidates here relied upon it in deciding to purchase particular classes of time. Accordingly, even if the 1988 *Public Notice* precluded Channel 12 from establishing the separate classes of time reflected on its rate card, we would not continue to apply that policy because it does not comport with Congressional intent. *See generally, Williams Natural Gas Company v. FERC*, 3 F.3d 1544, 1553-1555 (D.C. Cir. 1993).

24. The Bureau also concludes that Complainants have failed to establish a *prima facie* case of rate discrimination by Channel 12. The equal opportunities and nondiscrimination provisions of § 73.1941(e) of the Com-

mission's Rules (formerly § 73.1940(c)), which implements § 315(a) of the Communications Act of 1934, as amended, "are predicated on the philosophy that *competing* legally qualified candidates are entitled to equal treatment in the availability of political advertising and other broadcast time not exempt as *bona fide* news programming." *Independent Democrats for LaRouche*, 57 RR 2d 98, 102 (1984).

25. In the instant case, none of the instances of alleged violations proffered by Complainants violate § 73.1941(e) because either the rates charged were for different classes of time or the candidates were not competing for the same public office in Texas. Thus, in the examples above, while Mr. Williams purchased non-preemptible time, Mr. Mattox purchased preemptible time. In the other examples above, Ms. Richards was a candidate for Governor, Mr. Mosbacher was a candidate for Lt. Governor, and Mr. Brown was a candidate for Attorney General.

26. The Complaint provides no instances of alleged rate discrimination with respect to Messrs. Luce, Hance, and Phillips. Consequently, it is concluded that these individuals have failed to state a basis on which relief may be granted, and the Complaint as to them, to the extent they allege rate discrimination by Channel 12, is dismissed.

II. TIMETABLE AND PROCEDURES FOR DISCOVERY

27. The Commission has determined that once a *prima facie* showing has been made, the complainants will be entitled to limited discovery, subject to specific conditions established by the Bureau. *Declaratory Ruling*, 6 FCC Rcd at 7513. Accordingly, we will allow Complainants (Ms. Richards and Messrs. Williams and Mattox) limited discovery on the issue of overcharges during the 45 days before the 1990 Texas primary election and the 60 days before the 1990 Texas general election.

28. The documents set forth in Appendix A to this *Order*, and answers to the written interrogatories set forth in Appendix B to this *Order*, must be served upon counsel for Complainants (not the Commission) by Channel 12 on or before the first day of the discovery period, which shall be 30 days after the release date of this *Order*.

29. Any request for further discovery by Complaints must contain a showing that such discovery is necessary to resolve the issue of overcharges. We emphasize that a request for depositions must demonstrate that depositions are necessary for resolution of the issue of overcharges, and it must include a list of the proposed deponents.[a] All discovery requests must be filed within the discovery period set forth in Appendix C. The Bureau will rule on all such requests as expeditiously as possible. The parties should make good faith attempts to resolve any discovery disputes, including requests for production of additional documents, for answers to additional interrogatories, and for taking of depositions, before any such dispute is presented to the Bureau for resolution.

30. Documents produced by the station that contain proprietary information may be redacted to delete the identities of commercial advertisers, including the name of the commercial advertiser, its address and telephone number, the name of any person employed by the advertiser, the name of any media company or agency representing the commercial advertiser, and the name of any person employed by such media company or agency. Further redactions will be allowed only if the information redacted is proprietary and not relevant to the resolution of the Complaint. Should Complainants serve documents upon Channel 12, they may redact proprietary information and so advise Channel 12 of the type of information deleted. Any objections to redactions that are not resolved by the parties should be submitted to the Bureau in a written pleading for resolution, along with copies of the documents at issue with the disputed information intact.

31. No documents, answers to written interrogatories, or deposition transcripts produced during discovery (including information revealed thereby) shall be provided to any third party other than the Commission. Originals and copies of all documents, answers to written interrogatories, and deposition transcripts produced shall be stamped with the statement: "This document is produced subject to a protective order entered by the Federal Communications Commission." It shall be the responsibility of the party producing the documents, answers to written interrogatories, or deposition transcripts to affix the stamp.

32. The parties must take reasonable measures to prevent unauthorized access to the documents, answers to written interrogatories, and deposition transcripts. Access must be limited to Complainants, Channel 12, their attorneys and staffs, and expert witnesses. The parties may require each other to disclose in writing the names of staff and experts who have access to documents and written information. The parties must explain to all staff and experts that the documents and their contents shall not be disclosed to any entity other than the Commission.

33. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances warrant. Such agreement should be confirmed in writing and a copy provided to the Bureau. As noted in the *Declaratory Ruling*, any failure to abide by the terms of this protective order may result in the imposition of sanctions, including dismissal of the Complaint, censure, suspension, or disbarment of the attorneys involved. *See* 47 C.F.R. § 1.24.

34. Extension of the discovery period (Appendix C) will be granted only where extraordinary circumstances exist and the parties agree to the extension, or the parties submit declarations that serious settlement discussions are ongoing. Any deadlines within the discovery period may be changed by mutual agreement, with notification to the Bureau, as long as all discovery is completed within the required time. Service of documents, discovery requests, and any pleading which requires a ruling by the Bureau is to occur by the dates set forth in Appendix C, unless modified by the Bureau or by mutual agreement of the parties.

35. Within 30 days after completion of discovery, Complainants shall file an Amended Complaint, alleging specific facts based on the information discovered and stating the nature of the violations and specifying the amounts said to be owed. After the station has filed its answer, the

[a] *See, Lawton Chiles, Bob Martinez, and Bill Nelson*, 8 FCC Rcd 714, 717 (MMB 1993). In this regard, we require a party seeking depositions to demonstrate with respect to each individual sought to be deposed that the individual's testimony is necessary for the resolution of the issues upon which discovery has been granted herein. The showing must include specific arguments demonstrating the necessity of the proposed testimony, both in terms of the information sought and the use of depositions as the means of securing the necessary information, and it should be supported by documentary evidence.

parties shall file with the Bureau their election to have the complaint resolved either by the Bureau or by Alternative Dispute Resolution ("ADR"). Unless the parties jointly elect ADR, the case will be disposed of by the Bureau.

36. Settlements of LUC claims are encouraged. Although the Commission retains its discretion to determine whether additional sanctions are warranted, the Commission is inclined to look with favor upon a settlement in making that determination. *See, Declaratory Ruling*, 6 FCC Rcd at 7521, n.52.

37. Therefore, it is concluded that Anne Richards, Clayton Williams, and Jim Mattox have established a *prima facie* case of violations in 1990 of the lowest unit charge provisions of § 315(b) of the Communications Act of 1934, as amended, by Channel 12 of Beaumont, Inc., licensee of Station KBMT(TV), Beaumont, Texas.

38. It is further concluded that Tom Luce, Kent Hance, Robert Mosbacher, Jr., Tom Phillips, and Buster Brown have not established a *prima facie* case of violations in 1990 of the lowest unit charge provisions of § 315(b) of the Communications Act of 1934, as amended, by Channel 12 of Beaumont, Inc., licensee of Station KBMT(TV), Beaumont, Texas.

39. It is further concluded that none of the Complainants has established a *prima facie* case of violations in 1990 of the rate discrimination requirements contained in § 73.1941(e) of the Commission's Rules.

40. ACCORDINGLY, IT IS ORDERED, that the Complaint, to the extent that Tom Luce, Kent Hance, Robert Mosbacher, Jr., Tom Phillips, and Buster Brown allege violations in 1990 of the lowest unit charge provisions of § 315(b) of the Communications Act of 1934, as amended, by Channel 12 of Beaumont, Inc., licensee of Station KBMT(TV), Beaumont, Texas, IS HEREBY DISMISSED.

41. IT IS FURTHER ORDERED that the Complaint, to the extent that the Complainants allege violations in 1990 of the rate discrimination requirements contained in § 73.1941(e) of the Commission's Rules, IS HEREBY DISMISSED.

42. IT IS FURTHER ORDERED, that Anne Richards, Clayton Williams, Jim Mattox, and Channel 12 of Beaumont, Inc., SHALL FOLLOW the procedures and timetables for discovery, post-discovery, and election of a complaint resolution procedure established herein.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX A

DOCUMENTS TO BE PRODUCED TO COMPLAINANTS

Certain documents shall be produced to Complainants by Channel 12 by delivering them to the offices of Barnes, Browning, Tanksley & Casurella, 166 Anderson Street, Suite 225, Marietta, Georgia 30060, in accordance with the procedures outlined in this *Order*. The documents to be produced are as follows:

1) All advertising contracts executed by or on behalf of candidates for public office in connection with the 1990 Texas primary and general elections.

2) All invoices, logs or other documents recording time, duration, or class of advertising time for each political advertisement ordered and/or aired on behalf of candidates for public office in connection with the 1990 Texas primary and general elections.

3) Copies of invoices and contracts for, and program logs related to, all commercial time run on the station during the 45 days preceding the relevant primary election; and copies of invoices and contracts for, and program logs related to, all commercial time run on the station during the 60 days preceding the relevant general election. This should include:

a) All invoices, logs or other documents recording time, duration, or class of advertising time for each commercial spot aired, and, if not apparent from the preceding, documents reflecting all agency discounts provided by the station;

b) All long term contracts that pertain to commercial spots, including make goods and bonus spots, that aired during these periods;

c) All addenda or memoranda relating to these invoices or contracts that alter or otherwise address the terms or provisions of any documents subject to production pursuant to this document production order;

d) All orders for commercial spots aired during these periods, including confirmation orders or contracts;

e) All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who purchased time that ran during these periods; and

f) All documents that describe the rate and other relevant terms (those that affect price or have a direct bearing on the characteristics, such as class of time, of each spot) of discount packages sold to commercial advertisers that included spots that aired during these periods.

4. All documents used by the station to explain to its sales personnel or other employees or agents dealing with political campaigns, the application of the lowest unit charge provisions of § 315(b) of the Communications Act of 1934, as amended. This should include any written policy statement(s) used by the station in 1990 which directly or indirectly related to the station's pricing policies.

5. All documents reflecting the existence, implementation, and results of any audit of rates charged to political advertisers performed by or on behalf of the station with respect to the 1990 primary and general elections, including any provision of rebates to such political advertisers, as well as all documents explaining or detailing the methodology used by the station in performing any such audit or providing any such rebates.

APPENDIX B

ADDITIONAL INFORMATION TO BE PROVIDED TO COMPLAINANTS

Answers to the following interrogatories shall be provided to Complainants in accordance with the procedures set forth in this *Order:*

1) Describe how KBMT(TV) determined its lowest unit charges ("LUC") in 1990.

2) Detail any actions taken by KBMT(TV) to ensure that political advertisers were, in fact, charged the lowest unit rate for the same class and amount of time during the same time periods which ran during the 1990 statutory LUC periods. This should include the identities of all individuals taking or participating in such action, identifying their position at the station, and should identify all documents which refer to or formed a part of the station's efforts to ensure that candidates received the LUC.

3) For each spot that aired during LUC time periods in which political spots were aired, indicate the class and length of each such spot if not apparent from the program logs, invoices or contracts.

4) Explain any codes used by the station or its sales representatives to indicate the rate, section or class of spot identified in confirmation contracts, program logs, affidavits of actual broadcast or other documents relating to advertising rates.

APPENDIX C

TIMETABLE FOR DISCOVERY AND POST-DISCOVERY

First day of discovery period:	Day 1
Documents in Appendix A and answers to written interrogatories in Appendix B due:	Day 1
Request by Complainants for further discovery (production of additional documents, answers to additional interrogatories, and/or for the taking of depositions) due:	Day 15
Opposition by station to Complainants' request for further discovery due:	Day 20
Station's request for discovery (production of documents, answers to written interrogatories, and/or for the taking of depositions) due:	Day 20
Opposition by Complainants to station's request for discovery due:	Day 27
Documents and answers to written interrogatories (if allowed by Bureau) pursuant to station's request for discovery due:	Day 45
Production of additional documents and/or answers to additional written interrogatories (if allowed by Bureau) pursuant to Complainants' request for further discovery due:	Day 60
Final day of discovery period:	Day 60
Complainants' amended complaint due:	Day 90
Station's answer to amended complaint due:	Day 105
Joint notice of election of complaint resolution procedure due:	Day 116

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

STILLWATER PUBLISHING, INC.,
licensee of Station KSPI-FM
Stillwater, Oklahoma

For Tax Certificate

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 1994; Released: October 20, 1994

By the Commission:

1. The Commission has before it for consideration an Application for Review filed on September 19, 1991 by Stillwater Publishing, Inc., licensee of station KSPI-FM, Stillwater, Oklahoma ("Stillwater"). Stillwater appeals from the action of the Mass Media Bureau ("Bureau") dismissing its May 8, 1991 Request for Declaratory Ruling that it is entitled to a tax certificate pursuant to 26 U.S.C. Section 1071, as amended. Section 1071 authorizes the Commission, in certain circumstances, to issue a certificate that entitles the recipient to defer taxes for gains realized upon the sale or exchange of property,[1] including, *inter alia*, circumstances that result in minority ownership of broadcast stations.[2] For the reasons stated below, we deny Stillwater's Application for Review of the Bureau's letter.

2. *Background.* In 1987, Stillwater and Brewer Communications, Inc. ("Brewer"), licensee of KTHK(FM), (formerly KOKL(FM)), entered into an agreement pursuant to which Stillwater and Brewer were to seek to modify the licenses of stations KSPI-FM and KTHK, respectively.[3] Pursuant to that agreement, Stillwater and Brewer jointly petitioned the Commission to amend the FM Table of Allotments and to modify the two stations' licenses. They asked that the Commission modify the KSPI-FM license to specify Channel 229C2 rather than its current Channel 230C in order to accommodate a KTHK upgrade to Channel 231C2 from Channel 232A. The request was approved by the Commission on November 3, 1988. *Report and Order* in MM Docket No. 88-39, 3 FCC Rcd 6425 (1988).[4] The *Report and Order* required Stillwater and Brewer to file applications necessary to effectuate the license modifications.

3. Subsequently, in June 1989, Brewer entered into an agreement to sell KTHK to Integrated Broadcasting Company, Inc. ("Integrated"), a minority-controlled corporation. One condition to consummation of the sale was that Stillwater had to file and the Commission grant the application which would permit the upgrade of the KTHK facilities contemplated by the 1987 agreement and required by the *Report and Order*.[5] In consideration, Stillwater was to receive $500,000 from Brewer.[6]

4. On August 2, 1989, the Commission granted the application (BALH-890615HI) to assign the license and sell the assets of KTHK from Brewer to Integrated. On June 11, 1990, Stillwater requested a tax certificate for the consideration it received for modifying the KSPI-FM license and for prosecuting the subsequent construction permit application. The Bureau denied this request on October 26, 1990. In so doing, the Bureau pointed out that tax certificates are granted on a discretionary basis to transferors selling to minority-controlled enterprises and that Stillwater was neither the licensee nor assignor of KTHK and was not relinquishing "property" as specified in Section 1071 of the Internal Revenue Code. *Letter to Eugene T. Smith, Esq.*, reference 8920-MW (Chief, Audio Services Division, October 26, 1990).

5. Some seven months later, on May 8, 1991, Stillwater sought a declaratory ruling that the staff misinterpreted Commission policy regarding tax certificates. The Bureau found that the request was a belated attempt to seek Commission review of an adverse staff action and under 47 C.F.R. §1.115(d) should have been filed within 30 days of the denial of Stillwater's request for a tax certificate. Additionally, the Bureau indicated once again that Stillwater's actions did not involve a "sale or exchange of property" as contemplated by Section 1071 and the Commission's tax certificate policy. *Letter to Eugene T. Smith, Esq.*, reference 8920-JFL (Chief, Audio Services Division, August 20, 1991).

6. Stillwater now requests review of that action, arguing that: (i) Section 1071 does not define what constitutes a "sale or exchange of property"; (ii) the Commission's tax certificate policy *Orders* do not contemplate the set of facts presented by Stillwater; (iii) it was a party to the KTHK sale contract and that its role was essential to consummation of the deal; and (iv) therefore Stillwater is entitled to a tax certificate.

7. *Discussion.* We agree with the Bureau that Stillwater's pleading was an untimely attempt to seek further review and was properly dismissed on procedural grounds. In any event, the arguments raised are without merit. In this case

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[1] Section 1071 provides, in pertinent part, that [i]f the sale or exchange of property ... is certified by the Federal Communications Commission to be necessary or appropriate to effectuate a change in policy of, or the adoption of a new policy by, the Commission with respect to the ownership and control of radio stations, such sale or exchange shall, if the taxpayer so elects, be treated as an involuntary conversion of such property....

[2] *See, e.g., Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849-51 (1982).

[3] Reprise Radio, Inc. ("Reprise") is also a party to the 1987 Agreement, which contemplated the sale of KTHK to Reprise.

[4] The stations have now been licensed to operate on the new frequencies. *See* application nos. BLH-900705KB, granted on March 22, 1991 (KSPI-FM) and BLH-900913KD, granted on June 17, 1991 (KTHK).

[5] June 13, 1989 agreement at para. 6.4. Thus Stillwater was a signatory to the agreement.

[6] June 13, 1989 agreement at para. 11.2. Under the same clause, Reprise received $400,000 for relinquishing its 1987 contractual right to buy KTHK. *See* note 3, *supra*. Reprise previously sought a tax certificate for its role in the Brewer/Integrated transaction, but the Bureau denied the request and Reprise has not appealed. *See Letter to Eugene T. Smith, Esq.*, reference 8920-MW (Chief, Audio Services Division, January 24, 1990).

it is Brewer, the licensee and transferor of KTHK, that is entitled to a tax certificate under Section 1071, and that certificate has been issued. *Letter to Eugene T. Smith, Esq.*, reference 8920-MW (October 26, 1990), *supra.*

8. Section 1071 authorizes the Commission to issue a tax certificate pursuant to which the tax on gain derived from the sale of "property" can be deferred if the Commission finds that the sale was "necessary or appropriate" to effectuate a new or changed policy. In 1978, the Commission determined that, in order to promote the policy of increased minority ownership of the media, it would issue tax certificates to sellers of broadcast propertiesH& when the property was transferred to a minority-owned or controlled entity. *Policy Statement on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978). In 1982, we further expanded use of our tax certificate authority to include, under certain circumstances, investors who provide "start-up" financing which allows for the acquisition of a broadcast property by a minority or minority controlled entity. *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, supra.*[7] Stillwater now asks that we again expand exercise of our tax certificate authority to include parties who at no time have had an interest in the broadcast property sold but, under the contract of sale, receive compensation for performing certain acts.

9. We see no justification in this case for the broad interpretation of Section 1071 urged by Stillwater. Stillwater agreed to change KSPI's channel and location and Brewer agreed to compensate Stillwater for the change prior to Brewer's decision to sell to a qualified minority. Further, under the terms of the sales contract, if the Brewer/Integrated transaction was terminated by either party for any reason, Stillwater nonetheless remained obligated to Brewer to make the channel and location change.[8] Thus the Stillwater/Brewer agreement was a discrete transaction, and the fact that Brewer ultimately decided to sell to a qualified minority was irrelevant to Stillwater's obligations to perform under that agreement. Contrary to Stillwater's reasoning, the fact that Integrated could terminate its agreement to purchase KTHK if Stillwater failed to fulfil its contractual obligations to Brewer is not, in and of itself, adequate justification for issuing Stillwater a tax certificate. We decline to extend our tax certificate policy to include third parties with no ownership interest in a station merely because they are tangentially involved in a transaction resulting in the sale of a station to a minority.

10. Accordingly, IT IS ORDERED, That, pursuant to 47 C.F.R §1.115(g), the Application for Review filed on September 19, 1991 by Stillwater Publishing, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[7] Specifically, tax certificates are available upon the divestiture of shares by investors who initially purchase shares in the broadcasting entity or purchase shares within one year after the issuance of a broadcast license, and who show that their capitalization either enabled a minority-owned or -controlled entity to acquire a station or provided necessary financing. 92 FCC 2d at 858.

[8] June 13, 1989 agreement at para. 11.2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Price Cap Treatment of Regulatory Fees Imposed by Section 9 of the Communications Act

ORDER

Adopted: October 7, 1994; Released: October 7, 1994

By the Chief, Common Carrier Bureau:

1. On June 8, 1994, the Commission adopted an order establishing the initial level of regulatory fees assessed pursuant to Section 9 of the Communications Act of 1934, as amended (Act). [1] At that time, the Commission declined to decide whether the cost of these regulatory fees constituted an exogenous cost for carriers regulated under the Commission's price cap regime. Rather, the Commission suggested that affected carriers should file for a waiver of Sections 61.44(c) and 61.45(d) of the Commission's rules if they desired to obtain exogenous cost treatment for the cost of the regulatory fees.[2] The Common Carrier Bureau likewise instructed the local exchange carriers (LECs) to file for a waiver in its order on the 1994 annual access tariff filings.[3] For the reasons stated below, on our own motion, we now issue a waiver permitting price cap regulated common carriers to treat the initial cost of the regulatory fees paid pursuant to Section 9 of the Act, and any subsequent changes in the level of the fees paid, either as a result of Commission modification of the fee schedule, or due to increases or decreases in the number of presubscribed or access lines on which the fee must be paid, as an exogenous cost by making appropriate adjustments to their price cap indexes.

2. The *Regulatory Fee Order* adopted rules to implement Section 9 of the Act. That order provided for the annual assessment and collection of regulatory fees by the Commission from, *inter alia*, common carriers, established the amounts of the fees for fiscal year 1994, and specified the rules for the payment of such fees. The fees for interexchange carriers and the LECs are based on the number of presubscribed lines and access lines, respectively. The Commission may modify the regulatory fee schedule for future years.

3. The Commission's price cap rules for the AT&T Corp. and the LECs permit certain adjustments to be made to the carriers' price cap indexes. Sections 61.44(c) and 61.45(d) of the Commission's rules grant exogenous treatment for any cost changes that the Commission shall permit or require, including certain types of changes specifically enumerated in those rules. As a procedural matter, carriers may obtain a waiver of the Commission's rules so that they may treat a cost as exogenous. A waiver of the Commission's rules may be granted for good cause shown.[4] The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.[5] In determining whether to permit a price cap carrier to treat a particular cost change exogenously, the focus is on whether the change is required by law or regulation, is beyond the carrier's control, is not otherwise reflected in the price cap formula, and would not adversely affect the carriers' incentives.[6] For the reasons set forth below, we conclude that a blanket waiver of the Commission's rules in this instance will not adversely affect the carriers' incentives under price caps and is in the public interest.

4. We conclude that the cost of the regulatory fees imposed by Section 9 of the Act and the Commission's implementing rules, including any cost changes caused by any Commission modification to the fee schedule, or any change in costs due to an increase or decrease in the number of presubscribed or access lines, meet our criteria for exogenous cost treatment. First, the fees are a statutory requirement of the Act. Second, carriers are unable to control the level of these costs because the fees are assessed pursuant to a Commission-prescribed schedule, similar to the congressional levy of a tax.[7] The initial assessment of regulatory fees, and any future changes in the fee schedule, is not likely to be otherwise reflected in the price cap formula because they are new and apply only to common carriers and other entities subject to the Commission's jurisdiction. Moreover, changes in fee levels resulting from future increases or decreases in the number of presubscribed or access lines would not be reflected in the price cap formula because such a change in lines would not necessarily correlate with the inflation and productivity components of the price cap formula. Finally, grant of exogenous cost treatment is consistent with the overall scheme of price cap regulation because carriers' incentives to operate efficiently are not altered by this ruling.

5. We are therefore, on our own motion, granting common carriers subject to price cap regulation a waiver to permit them to treat the assessment of regulatory fees

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[1] Implementation of Section 9 of the Communications Act, MD Docket No. 94-19, Report and Order, FCC 94-140 (released June 8, 1994), 59 FR 30984 (June 16, 1994) (*"Regulatory Fee Order"*).

[2] *Id.* at 34 n.38.

[3] 1994 Annual Access Tariff Filings, CC Docket No. 94-65, 9 FCC Rcd 3705 (Com. Car. Bur., 1994).

[4] *See* 47 C.F.R. § 1.3.

[5] Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[6] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989) (*AT&T Price Cap Order), modified on recon.*, 6 FCC Rcd 665 (1990) (*AT&T Price Cap Reconsideration Order). See also* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order), Erratum*, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), *modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Reconsideration Order), aff'd sub nom.*, National Rural Telecom. Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993). *See also* Southwestern Bell Telephone Co. v. FCC, No. 93-1168, slip op. at 5 (D.C. Cir. July 12, 1994).

[7] *See, e.g.*, Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Second Order on Reconsideration and Fourth Report and Order, 9 FCC Rcd 1637 (1993).

imposed by Section 9 as exogenous costs. As noted earlier, this holding applies to the costs associated with the initial assessment of the fees, any subsequent cost changes resulting from Commission modifications to the fee schedule, and to any changes resulting from increases or decreases in the number of presubscribed or access lines upon which the fee is assessed. We are addressing this issue on an industry-wide basis now to avoid the unnecessary expenditure of time and resources that would be required to propose and process individual waiver requests. To simplify and consolidate the review process for carriers and the public, we are establishing a filing schedule for carriers wishing to take advantage of this waiver for the initial assessment of the fees. Carriers may file their tariffs to be effective on November 15, 1994, on not less than 45 days notice. Alternatively, carriers may include the adjustment as part of their annual 1995 tariffs to take effect on July 1, 1995. Exogenous cost adjustments for future changes in the level of the regulatory fees or the number of presubscribed or access lines shall be included in a carrier's annual price cap tariff filing. Finally, because regulatory fees relate to all aspects of common carrier regulation, the fee should be spread proportionately among all the carrier's interstate and international services and should be allocated to the various price cap baskets based on revenues shown in the individual carrier's previous year's ARMIS report.

6. Accordingly, IT IS ORDERED, that, pursuant to authority contained in Sections 1, 4, and 201-205, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, and 201-205, and Section 0.291 of the Commission's rules, 47 C.F.R. Section 0.291, and on our own motion, common carriers subject to price cap regulation ARE GRANTED A WAIVER permitting exogenous treatment of the costs associated with the regulatory fees imposed by Section 9 of the Communications Act and the Commission's implementing regulations on the terms stated in this order.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: October 6, 1994

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In Re: Applications of Fox Television Stations to Transmit Program Material to Mexican Broadcast Stations XETV, Tijuana; XHNUL-TV, Nuevo Laredo; and XHRTA TV, Reynosa Matamoros.

File Nos. BFP-940217AG, BFP-940802AF, and Related Requests for Special Temporary Authority

Counsel:

Channel 51 of San Diego (Channel 51) filed an Application for Review asking us to overturn an August 11, 1994 decision of the Mass Media Bureau. The Bureau, acting on delegated authority, gave Fox Television Stations, Inc. special temporary authority (STA) to transmit a total of 9 games of the National Football League to Mexican Stations XETV, XHNUL-TV, and XHRTA-TV over a 6-week period. *Letter from Acting Chief Mass Media Bureau re: Fox Television*, DA 94-887, 9 FCC Rcd _____ (MMB August 11, 1994). At the time of the Bureau's action (and continuing through the present time) several related Fox applications, filed pursuant to 47 U.S.C. Section 325(c), were pending before the Commission. These related applications seek authority to transmit the entire NFL football season and additional live sports, news, entertainment, and public affairs programming to these Mexican stations over a five-year period. The Bureau based its STA decision on a finding of special circumstances, including the fact that the Commission would be unable to act on the underlying applications before the start of the football season and a finding that an STA would serve the public interest by providing additional program choices to American viewers along the border of the United States and Mexico. The Bureau did not give public notice of Fox's STA requests before granting the 6-week STA. Rather, the Bureau relied on a public notice exemption in Section 309(c)(2)(F) of the Communications Act.

Channel 51, a party to the related underlying proceeding, maintains that the Bureau violated the Communications Act's public notice requirements, arguing that the exemption cited by the Bureau applies only to the transmission of a singular program. Channel 51 believes that prior unpublished cases on which the Bureau relied, similarly misconstrued this public notice exemption. Additionally, Channel 51 argues that the Bureau's action could prejudice the Commission's ability to consider the issues raised in the underlying case. Another party, Century Development Corp., raises similar arguments in a Petition to Deny Fox's request for permanent authority to export programming to XHNUL-TV. Channel 51 and Century's interests in this matter stem from the fact that the signals of Mexican stations XETV and XHNUL-TV reach the American border communities of San Diego, California and Laredo, Texas, in which Channel 51 and Century, respectively, operate American television stations. The signal of XHRTA, the third Mexican station that Fox wishes to serve, reaches Brownsville, Texas, but no opposition to Fox's request to transmit programming to that station has been filed.

The application for review and other pleadings related to the Bureau's STA are now moot given that the authority granted by the Bureau expired by its own terms on September 26, 1994. Still pending before the Commission, however, is a request by Fox to extend the Bureau's STA and oppositions to that extension request which rely on arguments similar to those raised against the initial STA. Under these circumstances, we find it appropriate to consider here all of the arguments presented by Channel 51 and Century against temporary authority for Fox to export NFL programming while we consider Fox's related requests for permanent program export authorization.

Upon our review of the matters before us, we find that the Bureau's STA was proper and in accordance with applicable provisions of the Communications Act. We further find that the Commission will require approximately four more weeks to complete consideration of the issues in the underlying cases and that an extension of the STA for that period would serve the public interest.

Public Notice. First, we find that prior public notice of Fox's STA requests was not necessary because the STAs fell within the public notice exemption contained in 47 U.S.C. Section 309(c)(2)(F). That provision exempts from public notice requirements applications seeking foreign programming authority pursuant to Section 325 "where the programs to be transmitted are special events not of a continuing nature." The Bureau, citing a series of unpublished STA grants over the past 30 years, concluded that this exemption applies to multiple sports events that occur over a limited period of time or that involve a fixed number of games. We agree. Sports events, like other special events, are time sensitive, unrehearsed occurrences

which can be appreciated fully only if watched contemporaneously with the event. Each game played is unique, with the teams competing against each other changing from game to game, and with each game important to a particular team's competitive standing. These facts, coupled with the limited duration of the STA granted by the Bureau, support a finding that the STA granted by the Bureau covered special events of a non-continuing nature.

With respect to Channel 51's arguments to the contrary, we note that examples contained in the legislative history of Section 309(c)(2)(F) cite non-continuing events "such as the Queen's visit to Chicago, the dedication of the St. Lawrence Seaway, etc." *See* S. Rep. 690, 86th Cong., 1st Sess. (1959). These events are, however, simply examples. Congress gave the Commission discretion to determine whether other special events also fall within the exemption, and the Commission over the past 30 years has found that sports events can and do so qualify. Channel 51 is correct in its statement that past decisions interpreting Section 309(c)(2)(F) were uncontested and thus without detailed explanation, but this does nothing to convince us that the events approved in those decisions or in the Bureau's August 11, 1994 STA decision do not qualify as "special events not of a continuing nature."

Public Interest. The Bureau found that grant of a limited STA would serve the public interest by making additional programming options available to American viewers until such time as the Commission ruled on the underlying issues in these cases. The opposing parties contest this basis for the STA, noting that their American stations would have been willing to carry the NFL games had the Bureau denied the STA, that the Mexican stations' carriage of NFL football games merely replaced other programs that the Mexican stations would have carried in those time slots, and that other professional football games, including those of the NFL's American Football Conference, are broadcast on other stations that reach the areas at issue.

We find the Bureau's determination that the public interest would be served by the availability of Fox's NFL football games to the large American audiences in San Diego, Laredo, and Brownsville to have been well within its discretion and, for the reasons outlined by the Bureau, well-advised. Moreover, we agree with the Bureau that it was not required to consider arguments that Fox should have provided the subject NFL programming to American stations for interim carriage until such time as the underlying program export request was decided. Such an approach would have interjected the Commission into the complicated and highly individualized contractual relationship between a network and its affiliates -- an area that we have traditionally left to the private parties involved unless a clear public harm from doing so has been identified. Given the very limited scope and duration of the relief granted by the Bureau and in this order, no such harm is apparent. We see no reason, therefore, to intervene in the network affiliate relationship in the context of these limited STA decisions.

No Prejudice. We find no prejudice to the parties from the Bureau's STA decision. The STA was narrowly tailored and did not reach any of the issues pending before us in the underlying proceeding. Unlike the current STA proceeding, the underlying requests for permanent authority revolve around such issues as whether the Mexican stations are providing, or are required to provide, issue-responsive programming and the impact of the North American Free Trade Agreement (NAFTA) on consideration of program quality issues in Section 325 cases. Our consideration of these issues and our final decision on Fox's applications for a 5-year programming authority, will not in any way be limited by the Bureau's decision which was based on different considerations and which allowed the telecast of only 9 games over a 6 week period.

STA Extension. The Commission has not yet reached a decision on the issues related to the underlying cases and, given the particular nature and international implications of the issues involved, we do not expect to resolve this matter for several additional weeks. Fox, on September 16, 1994, requested an extension of its STA if the Commission did not act on the underlying applications prior to expiration of the Bureau's authorization. Without such an extension, Fox would be unable to transmit to Mexico the football games to be played on October 2, 1994 and successive Sundays. Fox argues that interruption of the programming would be disruptive and points out that there has been no objection to the content of the telecasts themselves, only to the qualifications of the Mexican licensees. Channel 51 opposes the STA extension request, arguing that loss of NFL games to San Diego viewers for a few weeks would not create any harm. Century Development also opposes the STA extension request, arguing that the qualifications of the Mexican licensees should be examined herein.

We conclude that an extension of the STA for a 4-week period would serve the public interest by preserving the availability of NFL programming (which has not itself been alleged objectionable) for substantial American audiences while the Commission considers the merits of Fox's requests for more permanent authority and the oppositions thereto. This relatively brief extension of Fox's STA (authorizing a maximum of 7 games over 4 weeks) is fully consistent with precedent and authority, as cited in the Bureau's STA decision.[1] The combination of the STA authority granted herein and the Bureau's 6-week STA grant, also is consistent with that precedent. For substantially the same reasons outlined in the Bureau's decision, we do not believe that an extension of the STA will prejudice Channel 51 or Century Development with respect to consideration of their Petitions to Deny. Accordingly, we shall grant a limited extension of the STA through October 24, 1994 or until the Commission's action on the underlying applications, whichever comes first.

Accordingly, IT IS ORDERED, that Channel 51's Application for Review of the Special Temporary Authority issued by the Mass Media Bureau and Channel 51's Request for Expedited Review ARE DISMISSED AS MOOT.

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[1] *See Letter from Acting Chief, Mass Media Bureau re: Fox Broadcasting*, DA-94-887, 9 FCC Rcd _____ (MMB August 11, 1994) *citing Letter from Chief, Audio Services Division re: San DIego Baja Radio Advertising,Inc.* (March 10, 1992) (STA to transmit approximately 40 baseball games over a two month period) and other cases/statutes cited therein. *See also Telegram from Chief, Broadcast Bureau re: San Diego Sockers* (March 29, 1979) (STA to transmit 6 soccer games over a 3 1/2 month period).

IT IS FURTHER ORDERED, that Fox's September 16, 1994 Request for Extension of Special Temporary Authority IS GRANTED, to the extent noted below, and Channel 51 of San Diego and Century Development Corporation's Oppositions to Fox's Request for extension of Special Temporary Authority ARE DENIED.

Pursuant to 47 U.S.C. §§ 309 (c)(2) (F) and 325(c), Fox Television Stations, Inc. IS HEREBY GRANTED an extension of its Special Temporary Authority to transmit to Mexican stations XETV, XHNUL-TV, and XHRTA-TV via satellite, the broadcast pictures and descriptions of National Football League football games. This authority shall continue through: (A) 11:59 p.m. local time on October 24, 1994 or (B) Commission action on the relevant underlying Fox application (BFP-940217AG or BFP-940802AF), whichever occurs first.

This letter was adopted by the Commission on September 30, 1994.

BY DIRECTION OF THE COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: October 18, 1994

SANTA ROSA TELEPHONE COOPERATIVE, INC. AND GTE SOUTHWEST INCORPORATED FILED A JOINT PETITION FOR WAIVER OF THE DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, APPENDIX-GLOSSARY, AND SECTION 61.41(C) OF THE COMMISSION'S RULES AAD 94-111

Comment Date: January 9, 1995
Reply Date: January 23, 1995

On August 8, 1994, Santa Rosa Telephone Cooperative, Inc. ("Santa Rosa") and GTE Southwest Incorporated ("GTE") filed a joint petition for waiver of the definition of "Study Area" as set forth in Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the petitioners to reflect the changes in their study area boundaries that would result from GTE's sale of one telephone exchange in Texas to Santa Rosa. Santa Rosa also seeks waiver of Section 61.41(c) of the Commission's price cap rules, 47 C.F.R. § 61.41, to exempt it from the price cap "All or Nothing" rule and allow it to continue to operate as a cost company in the National Exchange Carrier Association's common line and traffic sensitive pools. The petitioners state that this transaction is pending before the Texas Public Service Commission.

Interested parties may file comments on GTE and Santa Rosa's petition on or before **January 9, 1995**, and reply comments on or before **January 23, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference AAD 94-111. Four (4) copies should also be sent to Adrian Wright, Cost Analysis Branch, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1208-1.1216. For further information contact Adrian Wright at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: October 18, 1994

WEST PLAINS TELECOMMUNICATIONS, L.L.C. AND GTE SOUTHWEST INCORPORATED FILED A JOINT PETITION FOR WAIVER OF THE DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, APPENDIX-GLOSSARY, AND SECTION 61.41(C) OF THE COMMISSION'S RULES AAD 94-110

Comment Date: February 6, 1995
Reply Date: February 20, 1995

On August 8, 1994, West Plains Telecommunications, L.L.C. ("West Plains"), a wholly-owned subsidiary of Five Area Telephone Cooperative, Inc. ("Five Area"), and GTE Southwest Incorporated ("GTE") filed a joint petition for waiver of the definition of "Study Area" as set forth in Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the petitioners to reflect the changes in their study area boundaries that would result from GTE's sale of five telephone exchanges in Texas to West Plains. West Plains also seeks waiver of Section 61.41(c) of the Commission's price cap rules, 47 C.F.R. § 61.41, to exempt it from the price cap "All or Nothing" rule and allow it to continue to operate as a cost company in the National Exchange Carrier Association's common line and traffic sensitive pools. The petitioners state that this transaction is pending before the Texas Public Service Commission.

Interested parties may file comments on GTE and West Plains' petition on or before **February 6, 1995**, and reply comments on or before **February 20, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference AAD 94-110. Four (4) copies should also be sent to Adrian Wright, Cost Analysis Branch, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1208-1.1216. For further information contact Adrian Wright at (202) 418-0830.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-94-290

Application for authority to acquire and operate facilities for analog video service between the U.S. and Pacific Ocean Region satellites.

ORDER AND AUTHORIZATION

Adopted: September 30, 1994; Released: October 18, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-290 IS GRANTED and MCI Telecommunications Corporation (MCI) is authorized to:

a. lease from Comsat and operate channels of communications between MCI's Yacolt Washington earth station and appropriate INTELSAT satellites over the Pacific Ocean Region (POR), connecting with similar circuits between the satellites and earth stations in those POR countries listed in Comsat's international television tariff;

b. own and operate facilities in the Yacolt earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate facilities between the Yacolt earth station and MCI's Dominguez Hills, California operating center; and

d. use said acilities to provide analog video service between the U.S. and those POR countries referenced in subparagraph (a) above.

3. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

4. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

8. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

Application for authority to convey capacity in the TCS-1 and U.S.-Bahamas Cable Systems.	File No. I-T-C-94-425
Application for authority to convey capacity in the TAT-11 Cable.	File No. I-T-C-94-426
Application for authority to convey capacity in the Hawaii Tie Cable and the TPC-4 Cable System.	File No. I-T-C-94-466

ORDER AND AUTHORIZATION

Adopted: October 5, 1994; Released: October 18, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-94-425, I-T-C-94-426 and I-T-C-94-466 ARE GRANTED, and American Telephone and Telegraph Company (AT&T) is authorized to:

a. convey to All America Cables and Radio, Inc. Dominican Republic on an Indefeasible Right of User (IRU) basis a one half interest in 24 MAUOs[1] in the TCS-1 Cable System between Puerto Rico and the Dominican Republic;

b. convey to Compania Dominicana de Telefonos, C. por A. and Empressa Nacional de Telecomunicaciones de Columbia, jointly, on an IRU basis seven MAUOs in the TCS-1 Cable System between Puerto Rico and the Dominican Republic;

c. convey to Cable and Wireless Bermuda Ltd. on a lease basis a one-half interest in two MAUOs in the TCS-1 Cable System between Florida and Puerto Rico;

d. convey to Cable and Wireless West Indies Ltd. on a lease basis a one-half interest in one MAUO in the U.S.-Bahamas Cable System;

e. convey to PTT Enterprise of Slovenia on a lease basis a one-half interest in one MIU[2] in the TAT-11 Cable System between New Jersey and France;

f. convey to Telstra of Australia on an IRU basis a one-half interest in 158 MAUOs in the Hawaii Tie Cable;

g. convey to International Telekom Japan Inc. on an IRU basis a one-half interest in 30 MAUOs in the TPC-4 Cable System between California and Japan (Segments B1 and B2); and

h. convey to International Digital Communications Inc., of Tokyo on an IRU basis a one-half interest in 30 MAUOs in the TPC-4 Cable System between California and Japan (segments B1 and B2).

3. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] A Minimum Assignable Unit of Ownership (MAUO) is a 64-kbps circuit equivalent.

[2] A MIU is a unit designated as the minimum unit of investment in the TAT-11 Cable System, allowing the use of 2.048 mbps (30 MAUOs) and the additional 162,539.68 bits per second required for multiplexing in each direction.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

GTE HAWAIIAN TELEPHONE CO., INC. File No. I-T-C-94-438

Application for authority to acquire and operate facilities for direct service between Hawaii, on the one hand, and Venezuela and the Dominican Republic, on the other hand.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 5, 1994; Released: October 18, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between Hawaii, on the one hand, and Venezuela and the Dominican Republic, on the other hand, by GTE Hawaiian Telephone Co., Inc. (HTC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-438 IS GRANTED, and HTC is authorized to:

a. lease and operate one 2.048 Mbps terrestrial circuit between San Luis Obispo, California and West Palm Beach, Florida;

b. activate and operate previously authorized cable facilities between Hawaii and California and between Florida and Venezuela and the Dominican Republic; and

c. use said facilities to provide HTC's regularly authorized services, including IMTS, between Hawaii, one the one hand, and Venezuela and the Dominican Republic, on the other hand.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between HTC and its correspondents in Venezuela and the Dominican Republic, and HTC shall file a copy of the agreement, including the applicable accounting rate, with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51

4. IT IS FURTHER ORDERED that our authorization of HTC to provide private lines is limited to the provision of such private lines only between Hawaii and Venezuela and the Dominican Republic -- that is, private lines which originate in Hawaii and terminate in Venezuela or the Dominican Republic or which originate in Venezuela or the Dominican Republic and terminate in Hawaii. In addition, HTC may not -- and HTC's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the Hawaii or the Vietnam end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that Venezuela or the Dominican Republic affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), petition for reconsideration pending.

5. IT IS FURTHER ORDERED that neither HTC nor any persons or companies directly or indirectly controlling or controlled by HTC, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other U.S. carrier by reason of any concession, contract, understanding, or working arrangement to which HTC or any persons or companies controlling or controlled by HTC are parties.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li, Chief
International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 18, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NYNEX'S PETITION FOR WAIVER OF COMMISSION'S RULES TO ESTABLISH UNBUNDLED COMMON LINES

On October 3, 1994, NYNEX Telephone Companies (NYNEX) petitioned for waivers of Part 69 of the Commission's rules to enable them to provide unbundled common lines to competitive local exchange carriers (CLECs) in the State of New York.

NYNEX states that the New York State Public Service Commission has required it to file state tariffs offering unbundled residence and business links, or common lines. According to NYNEX, the N.Y. State tariff states that the interstate end user common line (EUCL) will apply to each link that NYNEX sells to a CLEC for resale, but it does not provide for the application of interstate carrier common line (CCL) charges to these links. NYNEX states that it does not have the ability to measure usage on the CLEC switches for purposes of applying CCL charges because the resold links will not be connected to a NYNEX switch.

NYNEX states that it does not believe that a waiver is necessary to apply EUCL charges to CLECs that purchase and resell NYNEX links, and it is not clear that the CCL charges are applicable to unbundled links. In the event the Commission finds the tariff to be inconsistent with the Commission's rules, however, NYNEX requests waivers of Part 69 of the rules to apply EUCL charges to carriers who purchase unbundled residence and business links and not to apply CCL charges to lines provided under the unbundled link tariff.

Interested parties may file comments on this petition for waiver by **November 15, 1994**, and reply comments by **November 30, 1994**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of these filings can be obtained from ITS, Inc. at (202) 857-3800.

We will treat these proceedings as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 94-105

In the Matter of

Petition of People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates

ORDER WAIVING CERTAIN PLEADING RULES AND DENYING DEFERRAL OF FILING DATES

Adopted: October 7, 1994; Released: October 7, 1994

By the Chief, Private Radio Bureau:

1. The Commission's rule governing the filing of pleadings in this proceeding contemplates only the filing of comments and replies on the state's petition to retain authority over intrastate cellular rates. It thus excludes Section 1.45,[1] which governs the general filing periods for motions, from the procedural rules which may appply.[2] This proceeding, however, raises confidentiality issues that have generated the filing of several motions and requests.[3]

2. We believe that equity requires that we permit interested parties to file nonfrivolous pleadings on confidentiality and related issues. We thus waive the prohibition of Section 20.13 on additional pleadings, and permit necessary additional pleadings to be filed pursuant to the terms of Section 1.45 of the Commission's Rules.

3. We have also received a Motion to Defer Filing Dates.[4] Movants ask that we defer the filing of replies, due October 19, 1994, to either (1) two weeks after opposing parties file any supplemental comments based on the disclosure of confidential information or (2) two weeks after the Commission issues a decision denying access to such confidential information. Movants contend that if additional information is disclosed, this will require supplemental pleadings that will duplicate the October 19 replies and "needlessly expand the number of pleadings (and the time involved) for consideration by the Commission."[5] They argue that a grant of the Motion will expedite review by permitting the filing of a consolidated reply. They add that if additional disclosure is not made, and the Commission moves quickly in reaching that decision, the proposed procedure will result in only minimal delay.[6]

4. We deny the Motion. As we explained in a recent order granting the parties a 15-day extension to file replies, the Commission must meet a one-year statutory deadline for ruling on the state's petition and deciding any reconsideration. We stressed that, "The Commission is faced with stringent statutory deadlines in a complex and massive proceeding."[7] Although we agree with Movants that disclosure of additional information may require that we permit the parties to supplement their comments, we cannot now predict whether such additional disclosure will be necessary. We believe that efficient administration and docket management requires adherence to the October 19, 1994 deadline for filing replies in this proceeding. For the foregoing reasons, we do not believe that good cause has been shown for the requested deferral.

5. Pursuant to Section 0.331 of the Commission's Rules,[8] the provisions of Section 20.13(a)(5) are WAIVED TO THE EXTENT INDICATED HEREIN, the Motion to Defer Filing Dates filed by Cellular Resellers Association, Inc., Cellular Service, Inc., and ComTech Mobile Telephone Company IS DENIED, and PR Docket No. 94-105 Notice of Ex Parte Contact and Request for Issuance of a Public Notice IS DISMISSED AS MOOT TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Private Radio Bureau

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[1] 47 C.F.R. § 1.45.

[2] Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1522 (1994), 59 Fed. Reg. 18493 (Apr. 19, 1994) (to be codified at 47 C.F.R. § 20.13 (a)(5)).

[3] *See, e.g.*, Motion of the Cellular Carriers Association of California to Reject Petition or, Alternatively, Reject Redacted Information (Sept. 19, 1994); Request for Access to California Petition for State Regulatory Authority Pursuant to the Terms of a Protective Order, filed by the National Cellular Resellers Association (Sept. 19, 1994); Emergency Motion to Compel Production to the California Public Utilities Commission of Information Contained in Oppositions to California's Petition to Retain State Regulatory Authority over Intrastate Cellular Service Rates (dated Sept. 29, 1994).

We have also received PR Docket No. 94-105 Notice of Ex Parte Contact and Request for Issuance of a Public Notice (Sept. 23, 1994), filed by the National Cellular Resellers Association (NCRA), asking that the Commission issue a Public Notice permitting any interested party to participate by telephone or in person in a September 30, 1994 meeting on confidentiality issues. All parties to the proceeding were given actual notice of the meeting and permitted to participate either in person or by telephone. Moreover, on September 30, 1994, the Commission issued a Public Notice of Comment Sought on Draft Protective Order, DA 94-1083, announcing that all interested parties could comment by October 7, 1994 on a draft protective agreement that had been distributed to all parties of record. We believe that these actions have rendered the NCRA request moot and we dismiss it on that ground.

[4] Motion to Defer Filing Dates (Motion) of Cellular Resellers Association, Cellular Service, Inc. and ComTech Mobile Telephone Co. (Oct. 4, 1994)(collectively Movants).

[5] Motion at 3.

[6] Motion at 3-4.

[7] Order Extending Time and Permitting Replies to Revised Petition, DA 94-1054 (Sept. 26, 1994) at 1-2.

[8] 47 C.F.R. § 0.331.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-135

In re Applications of

THE PETROLEUM V. NASBY CORPORATION — File No. BRH-890601VB

For Renewal of License
of Station WSWR (FM)
Shelby, Ohio

THE PETROLEUM V. NASBY CORPORATION — File Nos. BTCH-921019HX and BTCH-921019HY

For Transfer of Control
of Station WSWR (FM)
Shelby, Ohio

Appearances

Ann C. Farhat, on behalf of The Petroleum V. Nasby Corporation; Norman J. Goldstein, James W. Shook and Y. Paulette Laden, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: October 12, 1994; Released: October 20, 1994

I. PRELIMINARY STATEMENT

1. This proceeding involves the applications of the Petroleum V. Nasby Corporation (Nasby) for 1) the renewal of license to operate Station WSWR (FM) on Channel 261A at Shelby, Ohio, 2) the transfer of control of Station WSWR (FM). The applications were designated for hearing by the Federal Communications Commission on June 14, 1993 (*Hearing Designation Order* and *Notice of Opportunity for Hearing for Forfeiture (HDO)*, FCC 93-241, 8 FCC Rcd 4035 (1993); 58 Fed. Reg. 34050 (June 23, 1993)). The issues are:

(1) To determine the effect of Thomas L. Root's federal and state convictions on the basic qualifications of The Petroleum V. Nasby Corporation.

(2) To determine, pursuant to Section 310 (d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules, whether Thomas L. Root and Kathy G. Root engaged in the unauthorized transfer of control of The Petroleum V. Nasby Corporation.

(3) To determine, in light of the evidence adduced pursuant to the above issues, whether grant of the renewal application of The Petroleum V. Nasby Corporation will serve the public interest, convenience and necessity.

(4) To determine, in light of the foregoing, whether approval of the pending applications to transfer control of The Petroleum V. Nasby Corporation will serve the public interest, convenience and necessity.

The initial presentation of the evidence with respect to Issue 1 was assigned to the Mass Media Bureau (MMB or Bureau). The burden of proof on all issues rested with Nasby.

II. FINDINGS OF FACT

A.

2. Nasby is the licensee of Station WSWR(FM). PVN Ex. 1. Thomas L. Root was one of three directors of Nasby and was its corporate secretary from prior to May 1983 until he resigned those positions on March 21, 1990. Jnt. Ex. 1. Root served as general counsel and communications counsel of Nasby from prior to 1983 until his resignation on April 25, 1990, providing services from the law offices he maintained in Washington, D.C. Jnt. Ex. 1, PVN Ex. 2. Root was also a shareholder of Nasby until June 23, 1989, at which time he sold his remaining 15.6% interest to his parents for consideration. Jnt. Ex. 1. Changes in the stock ownership of Nasby reflecting that 1) Root, individually, and as a custodian for the benefit of his minor children, no longer held stock in Nasby, 2) Root's resignations as an officer and director of Nasby (on March 21, 1990), and 3) his resignation as legal counsel for Nasby (on April 25, 1990), were reported to the FCC in an amendment filed on April 27, 1990 to Nasby's 1989 annual ownership report and to Nasby's June 1, 1989 renewal application (File No. BRH-890601VB). Jnt. Ex. 1; MMB Ex. 11, MMB Ex. 12.

3. For a period of time prior to his resignation from positions with Nasby, Thomas L. Root represented applicants for FM construction permits in licensing proceedings before the Federal Communications Commission. Some of the license applicants Root represented were formed by Sonrise Management Services, Inc. ("Sonrise"). On March 21, 1990, a 33 count federal indictment was returned against Root in the United States District Court for the District of Columbia. Root was indicted on four counts in the United States District Court for the Southern District of Illinois on June 21, 1990. The Illinois criminal action was consolidated with the action in the United States District Court for the District of Columbia on September 11, 1990. Stip. at Pp. 1-2; Mass Media Bureau Exhibit (hereinafter "MMB Ex.") 1, MMB Ex. 2.

4. Mr. Root entered a plea agreement in the consolidated federal proceeding and was adjudged guilty on January 17, 1992, of two counts of altering, forging and counterfeiting public records, three counts of wire fraud and one count of transport of stolen monies obtained by fraud. Root's misconduct, which occurred in the context of application licensing proceedings before the Commission, included, *inter alia*, the submission of a counterfeit Federal Aviation Administration "No Hazard" determination in a Commission licensing proceeding in 1988, and the forging, in January 1989, of a counterfeit order of an Administrative Law

Judge of the Commission. The licensing proceedings did not involve Nasby in any way. On January 17, 1992, as a result of the convictions in the consolidated federal proceeding, Root was sentenced to a term of 33 months in federal prison, where he is now serving his sentence. Stip. at p.2; MMB Exs. 1, 2, 3.

5. State court indictments were also returned against Root in North Carolina and Florida in connection with events surrounding the formation of construction permit applicants by Sonrise. On June 4, 1990, three indictments were returned against Root in Nash County in North Carolina. On October 26, 1990, in North Carolina, Thomas L. Root pleaded no contest to 90 counts of selling an unregistered security, 90 counts of failing to register as a securities dealer, and 180 counts of securities fraud in violation of North Carolina statutes, and four counts of conspiracy. The misconduct in question took place as early as 1986. On August 28, 1992, the State of North Carolina entered a Judgment and Commitment for all counts to which Thomas L. Root pled no contest; Root was sentenced to 15 years in prison to be served concurrently with his federal sentence. Stip. at Pp. 2-3; MMB Exs. 4, 5, 6.

6. On August 13, 1990, an indictment was returned against, *inter alia*, Thomas L. Root in Pinellas County of the State of Florida. On January 10, 1991, a superseding indictment was filed against Root in Pinellas County. On June 23, 1992, in Florida, Root pleaded no contest to charges of racketeering, conspiracy to commit racketeering, organized fraud, organized securities fraud, and sale of unregistered securities. The misconduct took place as early as 1986. On June 23, 1992, Root was adjudicated guilty of one count of racketeering, one count of conspiracy to commit racketeering, three counts of organized fraud, one count of organized securities fraud, 20 counts of sale of unregistered securities, and 20 counts of securities fraud. He was sentenced to 15 years in prison to be served concurrently with the North Carolina and the federal charges. Stip. at p. 3; MMB Exs. 7, 8, 9.

7. Director and shareholder meetings of P. V. Nasby were held annually in May. From prior to 1983 until his resignation on October 31, 1988, David L. Williamson was the general manager of Nasby's station. Also, from before 1983, Williamson was one of three Nasby directors, Nasby's president and treasurer, and a Nasby shareholder. He resigned his positions as a director, president and treasurer on March 15, 1989. Williamson relinquished his Nasby stock in May 1989. Petroleum V. Nasby Ex. (hereafter "PVN Ex.") 2. Timothy J. Moore succeeded Williamson as the general manager of WSWR, and as a Nasby director, its president and its treasurer.

8. While holding his corporate offices and prior to his stock divestitures, Thomas L. Root attended corporate meetings of Nasby. PVN Exs. 1-3; Tr. 84. During their respective tenures, Williamson and Moore presided at these meetings. Financial information having to do with station operations was typically made available to shareholders at the meetings and Root was available to answer questions and explain legal issues which may have arisen regarding stock ownership. At the board meetings which followed, the financial status of the station was discussed, Nasby officers were elected, and the salary of the general manager was set. Root attended these meetings and exercised his vote on all matters coming before the board. PVN Ex. 1-2; Tr. 84.

9. Station debt financing would from time to time require the participation of members of Nasby's board of directors. When Moore became Nasby's acting general manager in November 1988, Moore assisted Root, who was an officer and Nasby board member (at a time when Moore had not yet been elected to such positions) in negotiations for station loan refinancing with WSWR's local Shelby, Ohio, bank. PVN Ex. 1. Root, as Nasby's secretary, executed the financing documents in November 1988 on behalf of Nasby and provided his personal guarantee. Moore's predecessor Mr. Williamson also negotiated loan financing with Nasby's bank from time to time and executed loan documents as the president of Nasby which loans also required Williamson's personal guarantee. In August 1988, when the station was experiencing financial difficulties, including a threat of action by the Internal Revenue Service, Mr. Williamson informed Mr. Root; Root, in turn, advanced to Nasby the $40,000 needed to satisfy the Internal Revenue Service.

10. From before 1983 until November 1988 when David Williamson resigned as the general manager of WSWR, Williamson had sole access to the station's checking accounts. PVN Ex. 2. From November 25, 1988 until September 7, 1993 (when in the course of discovery in this proceeding Moore found that Root's name had not been removed at the time of Root's resignations in March 1990), Root also had bank signature authority. During Moore's entire tenure, Root did not sign any WSWR checks.

11. Williamson testified that during his tenure at WSWR, he exercised complete control over all of the day-to-day operations of the station, with no assistance from the other two Nasby directors, Root and Emma D. Slone. Williamson was solely responsible for all employment policies and practices (hiring, firing and setting of employee salaries), and all station employees reported to Williamson. He also determined the station's format and its programming and its commercial policies. PVN Ex. 2. Like Williamson, Moore testified that during his tenure he, too, exercised complete control over the day-to-day operations of WSWR, including the establishment and implementation of employment policies and practices, programming and commercial policies. PVN Ex. 1; Tr. 58-59.

12. Moore testified that he had no knowledge that Root was under any criminal investigation; nor did Root ever inform him or the other Nasby officers or board members that he (Root) was under investigation by any federal or state authority. PVN Ex. 1. In March 1990 Moore received a letter of resignation from Root which stated that Root was resigning as an officer and director of Nasby. No reasons for Root's resignations were stated in the letter and Moore does not recall speaking with Root at that time to ascertain Root's reasons for resigning his corporate positions.

13. Nasby's renewal application was initially granted by the Commission on April 27, 1990; however, the grant was set aside on May 31, 1990. MMB Ex. 11, p. 25;MMB Ex. 12, p. 28. No specific reason for the return of the application to pending status was stated. Id. The renewal application and the transfer applications filed by Nasby on October 19, 1992 were designated for hearing on June 14, 1993 for the resolution of the stated issues. Following receipt of the May 31, 1990 letter from the Commission rescinding the station's license renewal, Moore contacted Root (who no longer served as Nasby's legal counsel) as he was "quite surprised by the letter" which stated no reason for the action taken by the Commission. Root informed

Moore that he had no idea why the Commission rescinded the station's license renewal grant. Root, unsolicited by Moore, did remind Moore in this telephone conversation of the need to file an annual ownership report in June 1990 and Root assisted in the preparation of the report which Moore filed. Nasby had not secured new counsel at this juncture. In subsequently securing new legal counsel, Moore was made aware for the first time of the FCC's concerns involving Root and the potential effect those concerns could have on the station's license renewal.

14. Following his divestiture of stock interests in Nasby, and resignations as an officer and member of Nasby's three-person board, Root did not attend or participate in any way in any corporate meetings of Nasby. Moore testified that since 1990 he has prepared all meeting notices and minutes of Nasby and has otherwise maintained the corporate record book upon receipt of the book from Root following Root's resignation in April 1990 as the station's legal counsel. Id, p. 6. Other than the assistance in the preparation of an annual ownership report filed by Moore on behalf of Nasby in June 1990 shortly following Root's resignation as legal counsel and prior to Nasby's securing new legal counsel, Root has provided no assistance to Nasby. Id, pp. 6-8; Tr. 66-67.

15. Throughout the entire time that Root served as one of three directors of Nasby and as corporate secretary, as well as the time subsequent to his resignations from positions with Nasby and divestiture of his stock interests, Root has not been involved in the day-to-day management, operation or control of Nasby and Station WSWR(FM). PVN Ex. 1, pp. 3-7; PVN Ex. 2, pp. 3-8; PVN Ex. 3, pp. 2-4.

16. Moore (and his predecessor Williamson), would from time to time, consult Root, who served as the station's legal counsel. PVN Ex. 1, pp. 6-7; PVN Ex. 2, pp. 7-8. Root's counsel was sought from time to time for the review of contracts, inquiries regarding Commission matters, including questions relating to contests, lotteries, and political advertising. Root also represented Nasby in connection with the filing of ownership information and applications. PVN Ex. 1, pp. 5-7; PVN Ex. 2, p. 8. Root was relied upon and handled the maintenance of the Nasby corporate book.

B.

17. As of May 29, 1989, Thomas L. Root, individually, owned 120.25 shares of Nasby stock representing 24.5% of the total issued and outstanding stock of the corporation. He also held 50 shares as custodian for his minor children, representing 10% of the total issued and outstanding stock of Nasby. Stip. at p. 3.

18. On May 30, 1989, Root acquired another 100 shares, representing 20% of Nasby's total issued and outstanding stock and on May 31, 1989, he transferred the 50 shares held by him as custodian for his minor children to the children as gifts. Thus, as of May 31, 1989, Root owned 220.25 shares of Nasby stock individually. Stip. at Pp. 3-4.

19. On June 1, 1989, Root transferred 50 of his own shares to the corporation as treasury shares in return for the forgiveness of a corporate debt which he had assumed. Also on that date, Root transferred 100 Nasby shares to his minor children as gifts. Thus, Root was left with ownership of 70.25 shares, or 15.6% of the total Nasby shares issued and outstanding. On June 23, 1989, Root transferred that remaining stock to his parents. Stip. at p. 4.

20. On June 1, 1989, Root's wife, Kathy G. Root, transferred 25 shares of Nasby stock individually owned by her to her minor children as gifts. This left Mrs. Root with a balance of 33 Nasby shares owned individually, representing 7.3% of the issued and outstanding Nasby stock, and 50 shares, or 11.1%, which she held as custodian for her minor children. Stip. at p. 4.

21. The foregoing ownership changes were first reported in an April 27, 1990, amendment to Nasby's 1989 annual ownership report and to Nasby's June 1, 1989, renewal application. On October 19, 1992, Nasby filed FCC Form 315, a transfer of control application seeking *nunc pro tunc* approval of the foregoing transactions. Stip. at p.4; MMB Ex. 11. Cumulatively, these transactions resulted in more than 50% of the Nasby stock being transferred. On October 19, 1992, Nasby also filed a second FCC Form 315 seeking approval of the proposed transfer of 70.25 shares of Nasby stock from Thomas L. Root's parents to the law firm of Ginsburg, Feldman & Bress. The second application is contingent upon Commission grant of the first application for transfer of control. Ginsburg, Feldman & Bress were attorneys for Thomas L. Root, and the proposed transfer is to cover legal fees. Stip. at pp. 4-5; MMB Ex. 12; Tr. 64, 65.

22. Kathy G. Root testified that it had been her intention as well as her husband's to establish a trust for their third child, Travis S.C. Root, who was born in 1987. In December 1986, trusts had been established for the Roots' two other children -- Thomas P.J. Root (age 12) and Leslie J.L. Root (age 9). Kathy G. Root and her husband commenced the establishment of the trust for their son Travis in 1988 in order to "even things up" for all three children. It was Kathy G. Root's understanding from her husband that the stock transactions, which were gifts to their minor children in order to make them all equal in their respective Nasby stock ownership, were structured so as to permit the stock transfers without exceeding the $10,000 per donee per annum gift tax ceiling, based on the fair market value of Nasby stock at the time of $400 per share. PVN Ex. 4, p. 1. Kathy G. Root testified that she was not aware of, nor did she focus on, the possibility that the transfers could result in the need to seek prior FCC approval, since in her mind the stock being redistributed for estate planning purposes would not result in anyone holding a majority interest in the station. Id. p. 2. Consequently, Ms. Root never discussed the possible need for filing an application with her husband, whom she assumed would handle whatever paperwork was necessary to effectuate the transfers. Id. As President of Nasby, Moore signed stock certificates relating to the ownership changes which are the subject of the first transfer of control application. Root never advised Moore that prior FCC approval should be obtained in connection with the stock transactions. Current Nasby counsel informed Moore in the fall 1992 that the stock transactions may have required prior Commission approval. PVN Ex. 1.

III. CONCLUSIONS OF LAW

A.

23. Evidence of conviction for misconduct constituting a felony is relevant to the Commission's evaluation of an applicant's or licensee's character. *Character Policy Statement*, 5 FCC Rcd. 3252 (1990). That is because such a conviction raises questions about whether an applicant or

licensee has the requisite propensity, or inclination, to obey the law. And in making the necessary determination, mitigating factors are to be taken into account. Thus, in a particular case, the Commission will consider "the willfulness of the misconduct, the frequency of the misconduct, the seriousness of the misconduct, the nature of the participation (if any) of managers or owners, efforts made to remedy the wrong, overall record of compliance with FCC rules and policies, and rehabilitation." The applicant/licensee in this case is Petroleum V. Nasby, and it has neither been convicted of or even accused of criminal conduct of any kind. It is therefore difficult to see how this case is rationally concerned with Nasby's propensity, or inclination, to obey the law. The question arises only because of Nasby's association (an association now plainly unfortunate) with a former principal who, without doubt, violated several significant laws in significant respects. In the presiding officer's view, however, Thomas Root's criminal taint provides no basis for imputing his criminal activities to the innocent Nasby.

24. The Commission has suggested that it is particularly sensitive to a principal's individual criminal acts involving broadcasting or any application before the Commission. In *Chapman Radio and Television, Co.*, 57 fcc 2d 76 (1975), *modified on other grounds*, 45 R.R.2d 239 (1979), an applicant's princi pal was not qualified to be a Commission licensee where the principal had been convicted of four felony counts of "conspiring to obstruct, delay, and affect commerce... by extortion and under color of official right." However, the applicant itself was found qualified to be a Commission licensee because the applicant had no reason to doubt the principals's character when he entered the corporation, knew nothing of the principal's subsequent criminal conduct, and the criminal conduct did not involve broadcasting or any application before the Commission. In *Sand e Broadcasting Co., Inc.*, 61 F.C.C. 2d 305(1976), the Commission was faced with a renewal applicant whose application was challenged by a third party. The petitioner provided evidence that a 35% shareholder of the licensee, who also had served as an officer and director, had been convicted on three counts of grand larceny and three bad check charges, resulting in his having received a sentence of from zero to seven years in a state prison. The criminal activities and the principal's ownership in the station ran concurrently; a loan from a separate company, 50% - owned by the principal and which was involved in the criminal conduct, financed the purchase and operation of the station; and, the other one-half owner of the separate company, who remained a 35% shareholder of the licensee, was associated with the principal and the station during the same period of time. On these facts, the Commission declined to order an evidentiary hearing. In the Commission's view, it was significant that no facts showed the principal to have been involved in the day-to-day operations of the radio station. Even more importantly, the principal's acts did not involve broadcasting or any application before the Commission and the principal was removed from the corporation prior to his felony convictions.

25. Certain of Thomas Root's misconduct occurred precisely in the context of broadcast licensing proceedings before the Commission, including the forging of a counterfeit order of an Administrative Law Judge and the submission of a counterfeit Federal Aviation Administration "No Hazard" determination. Those transgressions, however, bore no relation to the applicant/licensee in this case -- P. V. Nasby -- and were simply a consequence of Root's wholly unrelated representation of various clients in pursuit of his private law practice. Nasby had nothing to do with Root's conduct of his private law practice. In *West Jersey Broadcasting Co.*, 90 F.C.C. 2d 363(1982), an illegal settlement payment was made by an applicant to secure the withdrawal of a competitor. The condemned activity was undertaken by some of the applicant's principals on behalf of, and with the intent to benefit, the applicant itself. Unremarkably, the Review Board found the licensee unqualified to receive a renewal of its license. Further, in rejecting the licensee's request that the license be renewed in the name of a principal who had not been involved in the illegal payoff, the Board observed that the Commission will not "atomize a licensee into its molecular elements for a gratuitous adjudication on the discrete qualifications... of individual shareholders." *West Jersey, supra*, at 371. Read literally, and without a particularized context, the quoted language could mean, as seemingly urged by the Bureau, that in no case does the Commission distinguish between guilty and innocent principals, and it is enough if even one of an applicant's principals is convicted of felonious misconduct. However, *Chapman, supra*, and *Sande, supra*, indicate that that is not the law.

26. Root was a Nasby shareholder, a director, its secretary and Nasby's corporate counsel. In carrying out these roles, he necessarily had some involvement in the ongoing affairs of the corporation. Root reviewed matters as the corporate attorney and was an active board member who voted on all matters coming before the board. He signed loan documents, gave his personal guarantee to a lending source and, on one occasion, advanced Nasby the sum of $40,000 with which to satisfy an Internal Revenue Service obligation. Contrastingly, however, Root was not involved in the day-to-day operations of the radio station. The management, operation and control of the station rested with Timothy J. Moore, the president of Nasby and its general manager since 1988 (first acting, then permanent), and prior to Moore, David L. Williamson. Furthermore, long prior to his federal convictions in January 1992 and state convictions thereafter, Root was no longer an officer, director and shareholder of Nasby, and had ceased serving as legal counsel. The other Nasby principals had no prior knowledge of the activities which led to Root's convictions. Root did not participate in any corporate meetings of Nasby after his resignations as an officer, director and legal counsel, and divestiture of his stock ownership. He had no further connection or involvement with Nasby, other than assistance with an ownership report due to be filed shortly after Root's resignation as legal counsel and prior to Nasby's having secured new counsel.

27. Root's participation is Nasby was not so pervasive as to implicate the Commission's concern in this case, i.e., Nasby's propensity to obey the law. The criminal activities do not support a denial of Nasby's application for the renewal of its license.

II.

28. Nasby concedes that stock transactions cumulatively involving the transfer of more than 50% of Nasby's issued and outstanding stock took place in May and June 1989. Although Section 310 (d) of the Communications Act, as amended prohibits the transfer of a license except upon

grant of a transfer application by the Commission, Nasby did not seek prior Commission approval for these transactions.

29. Even where an unauthorized transfer of control has occurred, the removal of a license is not always warranted unless the transfer was accompanied by a deliberate attempt to conceal it through misrepresentation. *Deer Lodge Broadcasting, Inc.*, 49 R.R. 2d 1317 (1981); *Stereo Broadcasters, Inc.*, 49 R.R. 2d 1263 (1981); *Silver Star Communications - Albany, Inc.*, 6 FCC Rcd. 6905 (1991). The Nasby transfers took place in 1989 prior to Root's indictments. When Root was first indicted in March 1990, Nasby's pending renewal application was amended and the ownership report submitted with the renewal application was also amended; the amendments set out the ownership changes. Then, when Nasby secured new communications counsel, the cumulative stock transfers were brought directly to the Commission's attention by the filing of the transfer of control application herein.

30. There has been no intentional deception by Nasby. Because Nasby has never attempted to misrepresent or conceal the facts bearing on ownership, the circumstances do not reflect adversely on Nasby's character qualifications so as to warrant denial of license renewal.

31. Nasby's neglect made possible repeated violations of Section 310 (d) of the Communications Act and Section 73.3540 of the Commission's rules. For that serious misconduct, a forfeiture in the amount of $4,000.00 will be imposed.

ULTIMATE CONCLUSIONS

32. Thomas L. Root's federal and state convictions do not disqualify the innocent Petroleum V. Nasby Corporation.

33. Nasby permitted an unauthorized *de jure* transfer of control to occur, in violation of Section 310 (d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's rules. The imposition of a forfeiture penalty pursuant to Section 503 (b) of the Communications Act is warranted.

34. In light of the evidence adduced, Nasby remains qualified to be a Commission licensee.

Accordingly, IT IS ORDERED that Nasby's application for renewal of its license, and 2) applications for transfer of control, are granted. IT IS ALSO ORDERED that the Petroleum V. Nasby Corporation forfeit to the United States the sum of $4,000.00 for violation of Section 310 (d) of the Communications Act.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

[1] In the event exceptions are not filed within (30) days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commissions Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-120

In the Matter of

AT&T Communications Transmittal No. 6788
Tariff F.C.C. Nos. 9 and 11

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: October 7, 1994; Released: October 7, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On February 17, 1994, AT&T Communications (AT&T) filed Transmittal No. 6788, by which AT&T proposed to amend its private line Tariff F.C.C. Nos. 9 and 11 to introduce "Feature Group A (FGA) and Feature Group B (FGB) Connections which provide the physical connection between a Local Exchange Company End Office Switch and the AT&T Central Office, for connection to AT&T Private Line Services." AT&T proposed to apply a single FGA (or FGB) charge to each FGA (or FGB) service it connects.[1]

2. In Transmittal 6788, AT&T proposed to resell the trunking facilities linking the AT&T Point of Presence (POP) to the LEC switch at which a Feature Group A or B customer's private line terminates in conjunction with the interexchange private line portion of Feature Group A and B access service that AT&T already provides.[2] Transmittal 6788 defines a Feature Group A connection as a transmission path between the line side of a local exchange carrier (LEC) end office switch and the AT&T POP for connection to AT&T private line services. Transmittal 6788 states that a Feature Group A connection provides line side access to a LEC end office switch, with an associated seven digit local telephone number, for an AT&T customer's use in originating and terminating calls. Similarly, Transmittal 6788 defines a Feature Group B connection as the transmission path between the trunk side of a LEC end office switch and the AT&T POP for connection to AT&T private line services. It further provides that the Feature Group B connection offers trunk side access to a LEC end office switch, with an associated uniform 950-XXXX access code, for AT&T end user customers' use in originating and terminating calls. Finally, Transmittal 6788 requires both Feature Group A and B customers to purchase an access coordination function, which authorizes AT&T to design, order, install, and perform other provisioning activities for the end user.[3]

3. On August 12, 1994, the Common Carrier Bureau adopted an order suspending Transmittal 6788 for five months and requiring AT&T to keep accurate account of all amounts received pursuant to the service under its tariff transmittal.[4] The *Suspension Order* also initiated an investigation to determine the reasonableness of the tariff revisions described in Transmittal 6788. By this Order, we designate the specific issues to be examined in this investigation, and establish schedules and procedures for the filing of the pleadings.

4. The purpose of this investigation is to determine whether AT&T's offering of Feature Group A and B connection service under Transmittal 6788 constitutes an unreasonable practice in violation of Section 201(b) of the Communications Act of 1934, 47 U.S.C. § 201(b). We are particularly concerned that end user customers of LEC Feature Group A or B access service might be billed under the AT&T tariff for the access portion of their service[5] even if they have not ordered that portion of their service from AT&T. We are also concerned that AT&T proposes to resell the local transport entrance facility and direct trunked transport rate elements on a bundled basis.[6]

II. ISSUES DESIGNATED FOR INVESTIGATION

5. We designate the following issues for investigation:

Issue 1: Is it reasonable for AT&T to bill an end user customer for Feature Group A or B connection service when an end user has not affirmatively ordered this service from AT&T?

1. AT&T should explain how the end user becomes an AT&T customer for Feature Group A or B connection service. AT&T's response should include the following information:

a. Prior to the local transport restructure, who was the LEC's customer of record for each access rate element of Feature Group A and B service? If AT&T ordered Feature Group A or B service from the LEC

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[1] Feature Group A service, among other things, allows callers to contact the subscriber to this service outside their local calling area without paying toll charges to either the interexchange carrier or to the LEC. For ease of discussion, we will refer primarily to Feature Group A service, although the same principles apply to Feature Group B service. For a detailed discussion of Feature Group A and B service, refer to the *Suspension Order* at paras. 2-5.

[2] These trunking facilities are accounted for in the entrance facility and direct trunked transport rate elements. *See* Transport Rates Structure and Pricing, 7 FCC Rcd 7006 (1992) (*Transport Order*); *recon.*, 8 FCC Rcd 5370 (1993) (*First Reconsideration Order*); *further recon.*, 8 FCC Rcd 6233 (1993); *further recon. pending* (collectively, *Transport Orders*).

[3] *See* AT&T Tariff F.C.C. No. 11, Sections 8.2.8 and 8.2.9.

[4] AT&T Communications Tariff F.C.C. Nos. 9 and 11, Transmittal No. 6788, DA 94-889, rel. Aug. 12, 1994 (Com. Car. Bur.) (*Suspension Order*).

[5] Access service is comprised of the customer line, or loop, the end office switch, and transport to the IXC POP.

[6] Under the local transport restructure, the LECs are required to provide these rate elements on an unbundled basis, so that customers may choose alternative suppliers for portions of access service as their needs dictate. *See Transport Order*, 7 FCC Rcd at 7016-17. In discussions with Tariff Division staff, AT&T indicated its unwillingness to provide these elements on an unbundled basis.

as agent for the end user customer, was AT&T or the end user designated the customer of record? Who did the LEC bill for the Feature Group A or B service charges? Was AT&T or the end user responsible for payment of the Feature Group A and B charges assessed by the LECs? If AT&T was the LEC's designated customer of record, under what tariff did it provide the Feature Group A or B access service to the end user and what charges did AT&T assess end user customers? How does AT&T's provision of Feature Group A and B service comply with Section 203 of the Act when AT&T: (1) acts as the end user's agent, or (2) is designated customer of record by the LEC?

b. AT&T should indicate whether it or the LECs notified end user customers of any changes in either their status as customers or in the billing of Feature Group A and B service since the transport restructure occurred. AT&T should also describe how end users who are the LECs' customers of record for LEC access service were converted to customers of AT&T service. AT&T should provide an example of the notices provided.

2. AT&T should explain how an end user customer can either affirmatively order, or decline to receive, Feature Group A or B service from AT&T if the customer desires to continue receiving either the entrance facility or direct trunked transport rate elements from the LECs. AT&T's response should include the following information:

Does AT&T intend to charge Feature Group A and B end user customers for the service if they have not affirmatively ordered AT&T's connection service nor actively consented to take service from AT&T instead of the LECs?

Issue 2: Is AT&T's practice of bundling the Access Coordination Function with Feature Group A and B Connection Service reasonable?

1. How will AT&T's provision of the access coordination function differ under Transmittal 6788 from the coordination service it has previously provided for voice grade special access service? If coordinated service, as distinct from end-to-end service, is not to be provided in connection with Feature Group A and B connection service, explain why this practice does not unreasonably restrict customers from taking a portion of their Feature Group A or B access service from the LECs.

2. If the end user customer does not take AT&T's Feature Group A or Feature Group B Connection Service, can that customer continue to receive Feature Group A or B access service from the LECs using a voice grade connection or must the customer purchase a high capacity facility and incur charges over and above the voice grade rates?

3. Who determines the level of the network interface (*e.g.*, voice grade, DS-1, or DS-3) at an AT&T POP?

4. If AT&T requires the facilities used to provide Feature Group A or B service to connect at a high capacity interface at AT&T's POP, how will end users be able to use a LEC's voice grade transport and entrance facilities to enter AT&T's POP? Should AT&T, the LEC, or both provide the multiplexing necessary to meet AT&T's interface requirements? Should AT&T, the LEC, or both provide a customer with voice grade transport from the end office to the IXC POP?

Issue 3: Is AT&T's practice of bundling the entrance facility and direct trunked transport rate elements together reasonable?

AT&T should explain why it has bundled these two transport rate elements in its Feature Group A and Feature Group B connection service. If AT&T maintains that it cannot offer this connection service on an unbundled basis, AT&T should state the reasons why it cannot do so and why it is not unreasonable to restrict end user customers' ability to take the unbundled transport rate elements, including usage-based transport, to the entrance facility of the AT&T POP.

Issue 4: Are the terms and conditions of service provided under Transmittal 6788 reasonable?

Is the existing Feature Group A and B traffic transported on facilities used to provide both special and switched access, or on facilities used to provide other switched access services? Does AT&T or the LEC determine the facilities over which the traffic travels? Does AT&T or the LEC control the assignment of circuits on these entrance facilities terminating at AT&T's POP? If AT&T controls this function, how can the Feature Group A or B end user remove its traffic from those entrance facilities to avoid being charged by AT&T for its use of the entrance facilities?

Issue 5: Are the charges proposed to be included in Tariffs 9 and 11 pursuant to Transmittal 6788 reasonable?

1. AT&T should provide an example of how it derived the nonrecurring and recurring charges it proposes to assess. In addition, AT&T should describe in detail the actual costs that are reflected in the nonrecurring and recurring charges, and the source of those costs. This description should include the cost of the actual high capacity facilities used for Feature Group A or B service -- not the full voice grade charges.

2. AT&T should explain why a non-recurring charge is included in the rates for the connection service it proposes, and explain how it derived the non-recurring charge it proposes to assess.

3. Because the end user customers for this service are current LEC customers and because they currently appear to have in place the facility for Feature Group A and B service, AT&T should explain why it is not unreasonable to fail to exempt these customers from its nonrecurring charge.

Issue 6: Is AT&T's practice of charging Feature Group A and B end users for Feature Group A and B connection service reasonable in areas where LECs currently offer split billing arrangements?

1. Describe currently available LEC split billing or other methods of LEC billing end user customers directly for the customer's portion of the high capacity facilities used.

2. AT&T should discuss whether the current forms of split billing are reasonable. AT&T should also indicate whether these arrangements or some other form of split billing would solve the Feature Group A and B billing problem from the point of view of the end user customer and from AT&T's point of view.

3. To the extent split billing is available, AT&T should explain why it has failed to consider using that or other billing options so that end users can be billed only for the portion of the high capacity facilities used to transport their voice grade Feature Group A and B service to AT&T's POP. AT&T should also explain why, in light of the existence of these split billing options, AT&T's practice of billing the Feature Group A and B end users under Transmittal 6788 is not unreasonable under Section 201(b) of the Act.

4. Could AT&T use the mechanism in Tariff 11, Section 3.3.6, "Arrangement for LEC Use of Existing High Capacity Access" provided to AT&T, to recover from the LEC for LEC use of AT&T high capacity facilities to transport Feature Group A and B traffic to the AT&T POP?

III. PROCEDURAL REQUIREMENTS

A. Filing Schedules

6. This investigation will be conducted as a notice and comment proceeding. CC Docket No. 94-120 has been assigned for this purpose. We designate AT&T as a party to this investigation. AT&T shall file its direct case no later than 14 days after the release date of this Order. In its direct case, AT&T must respond to all the issues designated in this Order. Moreover, the direct case must supply all information upon which AT&T relies to support its position. Pleadings responsive to the direct case may be filed no later than 7 days after direct case is filed, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." AT&T may file a "rebuttal" to oppositions or comments no later than 7 days after oppositions are filed.

7. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. These comments should specify the docket number of this investigation.

8. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information is in writing and is placed in the public file or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

B. Ex Parte Requirements

9. For the purposes of this non-restricted notice and comment proceeding, members of the public are advised that *ex parte* contacts (*i.e.*, written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a final Order is released and after the final Order is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, see generally Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.200 *et seq.*

C. Paperwork Reduction Act

10. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 201(a), 201(b), 202(a), 204(a), 205(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§154(i), 154(j), 201(a), 201(b), 202(a), 204(a), 205(a) and 403, and Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, the issues set forth in this Order ARE DESIGNATED FOR INVESTIGATION.

12. IT IS FURTHER ORDERED that AT&T Communications, Inc. SHALL BE a party to this proceeding.

13. IT IS FURTHER ORDERED that AT&T Communications, Inc. SHALL INCLUDE a response to each item of information requested in this Order.

14. IT IS FURTHER ORDERED that this Order shall become effective on the date of its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ECONOPHONE. INC. File No. I-T-C-94-353

Application for authority to acquire and operate facilities in the PTAT-1 cable for provision of service between the U.S. and various international points.

ERRATUM

Released: October 19, 1994

By the Chief. International Facilities Division:

1. On September 26. 1994, an Order, Authorization and Certificate was released in the above-captioned proceeding. DA 94-1019. The following corrected Appendix should be substituted for the one attached thereto.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief. International Facilities Division
Common Carrier Bureau

APPENDIX

Countries to be served via PTAT-1

Austria
Belgium
Cyprus
Denmark
France
Germany
Gibraltar
Greece
Hungary
India
Israel
Ireland
Italy
Kuwait
Luxembourg
Netherlands
Norway
Pakistan
Poland
South Africa
Sweden
Switzerland
Turkey
United Kingdom

Before the
Federal Communications Commission
Washington, D.C. 20554

Report No. DS-1468 **Released: October 12, 1994**

WRC-95 INDUSTRY ADVISORY COMMITTEE

IWG-2 - MSS Below 1 GHz
Revised Meeting Schedule

Informal Working Group 2 (IWG-2-MSS Below 1 GHz) of the FCC's WRC-95 Industry Advisory Committee will hold its next meeting on Monday, October 24, 1994 instead of Wednesday, October 26, as previously announced. The meeting will convene at 9:30 a.m. at the offices of Leventhal, Senter and Lerman, 2000 K Street, N.W., Suite 600, Washington, D.C.

Participation in this meeting is open to all members of the public. For further information contact Kristi L. Kendall, Domestic Facilities Division, (202)634-7058.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 12, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON GTE'S PETITION FOR WAIVER OF COMMISSION'S EQUAL ACCESS RULES FOR LAMBERTVILLE, MI

On September 28, 1994, GTE Service Corporation (GTE) filed a petition seeking an extension of the equal access waiver previously granted to Alltel for the Lambertville, Michigan exchange.

GTE states that Lambertville, Michigan is one of the exchanges GTE acquired from Alltel in early 1994. GTE states that it scheduled the Lambertville exchange to convert to equal access on April 14, 1995. GTE states that when it scheduled the equal access conversion, it was unaware that Alltel had previously obtained a waiver from the Commission to defer the conversion of the Lambertville exchange until November 15, 1994. GTE now seeks a five-month extension of the initial waiver.

GTE states that new equal access compatible technology is to be placed into service on October 27, 1994. GTE states that based on the balloting and allocation guidelines, the Lambertville exchange is scheduled to convert to equal access on April 14, 1995. GTE states that the public interest would be served by maintaining the schedule established by GTE and proceeding with the orderly processing of the conversion.

Interested parties may file comments on this petition for waiver by **October 26, 1994**, and reply comments by **November 4, 1994**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of these filings can be obtained from ITS, Inc. at (202) 857-3800.

We will treat these proceedings as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-36

In the Matter of

Amendment of Section 73.202(b)	RM-8447
Table of Allotments,	
FM Broadcast Stations.	
(Flandreau, South Dakota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1994; Released: October 20, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Carmen C. Christensen ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 2304 (1994), proposing the allotment of Channel 300C3 at Flandreau, South Dakota, as that community's first local aural transmission service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 300C3 at Flandreau, South Dakota, since it would provide the community with its first local aural transmission service. An engineering analysis has determined that Channel 300C3 can be allotted to Flandreau in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Flandreau, South Dakota	300C3

4. The window period for filing applications will open on **December 5, 1994**, and close on **January 5, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 300C3 at Flandreau are North Latitude 44-02-54 and West Longitude 96-35-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-257

In the Matter of

Amendment of Section 73.202(b) RM-8327
Table of Allotments,
FM Broadcast Stations.
(Glasgow, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1994; Released: October 20, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Henry Royse ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 7101 (1993), proposing the allotment of Channel 231A at Glasgow, Kentucky, as that community's third local FM transmission service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 231A at Glasgow, since it would provide the community with its third local FM transmission service. An engineering analysis has determined that Channel 231A can be allotted to Glasgow in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.9 kilometers (2.4 miles) southeast to avoid a short-spacing to the construction permit for Station WHIC(FM), Channel 232C2, Hardinsburg, Kentucky.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Glasgow, Kentucky	231A, 236C, 287C3

4. The window period for filing applications will open on **December 5, 1994**, and close on **January 5, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As indicated in the *Notice*, petitioner's proposal, although signed and address provided, was not verified as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in its responsive comments and has complied accordingly.

[2] The coordinates for Channel 231A at Glasgow are North Latitude 36-57-41 and West Longitude 85-54-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-74

In the Matter of

Amendment of Section 73.202(b) RM-8503[1]
Table of Allotments,
FM Broadcast Stations.
(Elma, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1994; Released: October 20, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Skip Marrow ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3413 (1994), proposing the allotment of Channel 271A at Elma, Washington, as that community's first local aural transmission service. The petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 271A at Elma, Washington, since it would provide the community with its first local aural transmission service. An engineering analysis has determined that Channel 271A can be allotted at Elma in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at petitioner's requested site.[2] Since Elma is located within 320 kilometers (200 miles) of the U.S-Canadian border, concurrence of the Canadian government has been obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Elma, Washington	271A

4. The window period for filing applications will open on **December 5, 1994**, and close on **January 5, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] By Erratum, released July 29, 1994, the rule making number was corrected to reflect RM-8503 in lieu of RM-8476.
[2] The coordinates for Channel 271A at Elma are North Latitude 47-00-13 and West Longitude 123-24-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-80

In the Matter of

Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations. (Iron Mountain and Menominee, Michigan, Wittenberg, Wisconsin, and Ely, Minnesota) — RM-8445

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 12, 1994; Released: October 20, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 3314 (1994), issued in response to a petition filed by Douglas A. Maszka d/b/a Tri-Cities Television Company ("petitioner"). The *Notice* proposed the following options: Allotment of Channel 25+ at Menominee, Michigan, or allotment of Channel 46 at Wittenberg, Wisconsin, or substitution of Channel *25+ for Channel *17+ at Iron Mountain, Michigan and allotment of Channel 31+ at Menominee, Michigan, or substitution of Channel *25+ for Channel *17+ at Iron Mountain, Michigan, allotment of Channel 17- at Wittenberg, Wisconsin, and change of the offset for Channel 17, Ely, Minnesota, from a minus to a plus. Petitioner failed to file comments reiterating its interest in the proposed allotments. No comments were received stating an intention to file an application for any of the proposed channels. The Association of America's Public Television Station ("APTS") filed opposition comments.

2. APTS, a nonprofit membership association, strongly opposes petitioner's request to substitute a higher channel for an existing educational allotment. APTS argues that petitioner offers no reasons why its proposal should be deemed a preferred allotment scheme, nor does he suggest any public interest benefits to justify the substitution. APTS notes that alternate channels can be allotted to Menominee and Wittenberg, providing new commercial service to the public, without the need to disturb existing educational allotments.

3. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted, and absent such an expression of interest, it is the Commission's policy to refrain from allotting a channel. Therefore, petitioner's request to substitute Channel *25 for vacant Channel *17 at Iron Mountain, Michigan, allotment of Channel 31 to Menominee, Michigan, and allotment of Channel 17 to Wittenberg, Wisconsin, will be dismissed.

4. Accordingly, IT IS ORDERED, That the request of Douglas A. Maszka d/b/a Tri-Cities Television Company to substitute Channel *25 for vacant Channel *17 at Iron Mountain, Michigan, allotment of Channel 31 to Menominee, Michigan, and allotment of Channel 17 to Wittenberg, Wisconsin, IS DISMISSED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-319

In the Matter of

Amendment of Section 73.202(b) RM-8404
Table of Allotments,
FM Broadcast Stations.
(Omak, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 12, 1994; Released: October 20, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Omak Community Broadcasters ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 1 (1994), proposing the allotment of Channel 282C2 at Omak, Washington, as that community's second local FM transmission service. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 282C2 at Omak, Washington, since it would provide the community with its second local FM transmission service. An engineering analysis has determined that Channel 282C2 can be allotted to Omak in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.5 kilometers (10.2 miles) south to avoid short-spacings to vacant Channel 281B, Trail, British Columbia and Station KAFE, Channel 282C, Bellingham, Washington.[1] Since Omak is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Omak, Washington	226C2,[2] 282C2

4. The window period for filing applications will open on **December 5, 1994**, and close on **January 5, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2780.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 282C2 at Omak are North Latitude 48-15-44 and West Longitude 119-31-58.
[2] We note that the *Notice* inadvertently lists in paragraph 3 under "Present" Channel 226C instead of Channel 226C2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-21

In the Matter of

Amendment of Section 73.202(b)	RM-8427
Table of Allotments,	
FM Broadcast Stations.	
(Garapan, Saipan, Northern Mariana Islands)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 12, 1994; Released: October 20, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Inter-Island Communications, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 1535 (1994), proposing the allotment of Channel 266C at Garapan, Saipan, Northern Mariana Islands, as that community's fifth local FM transmission service. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 266C at Garapan, Saipan, Northern Mariana Islands, since it would provide the community with its fifth local FM transmission service. An engineering analysis has determined that Channel 266C can be allotted to Garapan in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at petitioner's requested site.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Garapan, Saipan,	250C2, 258C1, 262C2,
North Mariana Islands	266C, 280A

4. The window period for filing applications will open on **December 5, 1994**, and close on **January 5, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 266C at Garapan, Saipan, are North Latitude 15-12-26 and East Longitude 145-42-57.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-75

In the Matter of

Amendment of Section 73.202(b)	RM-8483
Table of Allotments,	
FM Broadcast Stations.	
(Casper, Wyoming)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 11, 1994; Released: October 20, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Bruce L. Erickson ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 3392 (1994), proposing the allotment of Channel 247A Casper, Wyoming, as that community's fifth local commercial FM transmission service. The petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 247A at Casper, Wyoming, since it would provide the community with its fifth local commercial FM transmission service. An engineering analysis has determined that Channel 247A can be allotted at Casper in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Casper, Wyoming	233C, 238C, 247A, 279C, 295C

4. The window period for filing applications will open on **December 5, 1994**, and close on **January 5, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 247A at Casper are North Latitude 42-50-48 and West Longitude 106-18-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

CABLE & WIRELESS, INC. File No. I-T-C-88-157

Application for authority to resell the services of other common carriers for the provision of switched voice service from the U.S. to Hong Kong

ORDER ON CLARIFICATION

Adopted: October 7, 1994; Released: October 21, 1994

By the Deputy Bureau Chief, Common Carrier Bureau:

1. American Telephone and Telegraph (AT&T) filed a Petition for Clarification of the Bureau's Order, Authorization and Certificate in the above-captioned proceeding. Cable & Wireless, Inc., 7 FCC Rcd 4384 (Com. Car. Bur. 1992) (*CWI Order*). That Order granted authority to Cable & Wireless, Inc. (CWI)[1] under Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to resell, pursuant to contract, the switched voice services of TRT/FTC International, Inc. (TRT/FTC) between the United States and Hong Kong subject to specified conditions. AT&T argues that those conditions are insufficient to ensure nondiscriminatory treatment of U.S. carriers providing service to Hong Kong and that additional conditions are required. CWI opposed AT&T's Petition and AT&T responded. We deny the Petition for Clarification for the reasons stated below.[2]

BACKGROUND

2. On July 2, 1992, we granted the unopposed CWI application for authority to resell switched voice services of TRT/FTC between the United States and Hong Kong subject to certain conditions based on our finding that the grant was in the public interest. We noted that we have authorized U.S. carriers to provide international telecommunications services by resale of U.S. international switched services, including IMTS, since 1980. Although CWI's affiliate Hong Kong Telecom International Ltd. (Hong Kong Telecom) retains a monopoly over virtually all international telecommunications services in Hong Kong, we concluded that CWI's ability to discriminate against competing U.S. carriers would be limited because CWI would only resell the switched services of TRT/FTC.

3. We, however, imposed several specific conditions on the grant of authorization. First, CWI may only take service from TRT/FTC on terms, conditions and at rates that are publicly filed and generally available to similarly situated customers, *CWI Order*, 7 FCC Rcd at 4384, paras. 5 & 7.[3] Second, CWI must seek specific additional authority to resell international switched voice services of TRT/FTC pursuant to any modification of the contract between TRT/FTC and CWI dated September 3, 1991. *Id.* at para. 8. Third, CWI must comply with other filing requirements. *Id.* at 4384-85, paras. 9-12. Fourth, CWI must not bargain for, nor agree to receive, any return traffic from Hong Kong Telecom. *Id.* at 4385, para. 13. Fifth, neither CWI, nor any commonly controlled companies, may acquire or enjoy by reason of any concession, contract, understanding or working arrangement, any right in connection with handling or interchanging traffic to or from the United States that is denied to any other U.S. carrier. *Id.* at para. 14.

4. Although it does not oppose CWI's application, AT&T filed this Petition for Clarification following the release of the *CWI Order*. AT&T requests first that the Commission clarify and enforce the requirement that CWI file all terms, conditions, rates and arrangements between CWI and an underlying U.S. carrier for the provision of services to CWI. *Id.* at para. 7. AT&T asserts that CWI has not complied with this requirement. AT&T claims that the September contract between TRT/FTC and CWI expired, and that CWI has not publicly filed a copy of any subsequent agreement between them. AT&T Petition for Clarification, at 2. AT&T also contends that if, in the future, CWI obtains services from other U.S. carriers, copies of the relevant agreements with those carriers should be filed with the Commission as well. *Id.* at 3. AT&T also requests that the Commission clarify its Order to require the filing of any agreements referenced in relevant agreements between CWI and TRT/FTC, such as the August 16, 1991 agreement referenced in the September 3, 1991 agreement. *Id.* at n.2.

5. Second, AT&T contends that the *CWI Order* does not adequately prevent Hong Kong Telecom from granting concessions to TRT/FTC or any other U.S. carrier providing services to Hong Kong Telecom's U.S. affiliate, CWI. *Id.* at 4. Therefore, AT&T requests that the Commission modify its Order to: (1) prohibit TRT/FTC from receiving more than its fair share of return traffic from Hong Kong Telecom; and (2) prohibit TRT/FTC from receiving special treatment from CWI, Hong Kong Telecom or their affiliates. *Id.* at 5.

6. CWI opposes the Petition, arguing that the relief sought by AT&T is already afforded by the requirement that the operating agreement between TRT/FTC and Hong

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[1] When the Petition for Clarification was filed, CWI was formally called "Cable & Wireless Communications, Inc." Subsequently, CWI changed its name to "Cable & Wireless, Inc." *See* Letter from CWI to the Commission, dated September 15, 1993, File No. I-T-C-88-157.

[2] In a separate action, we are granting a Petition filed by CWI for modification of its regulatory status from dominant to nondominant for the provision of international message telephone service (IMTS) on routes where it has no affiliation and where CWI provides IMTS solely by reselling the IMTS of U.S. facilities-based carriers. Petition of Cable & Wireless, Inc. for Nondominant Status on All Routes Employing Resold International Message Telecommunications Services of Unaffiliated U.S. Carriers, DA 94-1133, adopted October 7, 1994 (Petition of CWI).

[3] This condition is based on the general obligation of U.S. international carriers. 47 U.S.C. § 203.

Kong Telecom be filed and by the Commission's International Settlements Policy, which forbids undue discrimination or favoritism. CWI Opposition To Petition for Clarification, at 4-5, *citing Implementation and Scope of International Settlements Policy for Parallel International Communications Routes*, 2 FCC Rcd 1118 (1987). CWI also argues that the Commission's Rules already require it to file other contracts, citing Section 43.51. 47 C.F.R. § 43.51.

7. Further, according to CWI, AT&T's expectation that Hong Kong Telecom is indirectly favoring CWI on the U.S.-Hong Kong route by granting concessions to TRT/FTC is "incorrect and unsupported." CWI argues that it is unlikely that any PTT could favor an affiliated U.S. carrier. CWI Opposition to Petition for Clarification, at 5-7. CWI states that Hong Kong Telecom has established a nondiscriminatory proportionate return policy with respect to all U.S. carriers, including AT&T and TRT/FTC. *Id.* at 5. Finally, CWI states that there was no contract entered into between CWI and TRT/FTC subsequent to the September 3, 1992 contract and that, contrary to AT&T's assertion, the September contract is still valid because the termination clauses were not mandatory, and neither party elected to terminate the contract. *Id.* at 7-8.

8. AT&T replies that CWI has not disclosed the terms of an August 16, 1991 agreement referenced in the September 3, 1991 agreement between CWI and TRT/FTC or the terms of any amendments to the September contract to which the parties may have orally agreed. AT&T Reply at 2-3. Once CWI files the terms and conditions of this contract, and any other agreements they may have subsequently entered into, AT&T states the Commission will be able to determine whether "additional authorization" is required, pursuant to paragraph 8 of the CWI Order. Finally, AT&T maintains that there are many favorable concessions that could be conferred on TRT/FTC by Hong Kong Telecom that would not be included in their operating agreement and thus would not be reviewable by the Commission. *Id.* at 5.

DISCUSSION

9. We turn first to AT&T's allegation that CWI's September 3, 1991 agreement with TRT/FTC expired and that CWI has failed to file any subsequent agreement. CWI states that there was no contract subsequent to the September 3, 1991 agreement, and we find no reason to question this representation. Although we agree with AT&T that the actual termination provisions of the contract were not clear from the terms of the September agreement, CWI has now clarified this matter for the record.

10. AT&T also alleges that CWI failed to file an earlier August 16, 1991 agreement. When we adopted the *CWI Order*, we had before us what we understood to be the entire agreement between CWI and TRT/FTC -- that is, the September 3, 1991 contract. In response to AT&T's Petition for Clarification, CWI filed a summary of the August 16, 1991 agreement and served it on all interested parties. This agreement sets forth terms under which TRT/FTC could resell the switched voice service of CWI on various U.S. international routes. On the basis of this filing and CWI's explanation of the termination provisions of the September agreement, we conclude that CWI does not require additional authorization pursuant to paragraph 8 of the CWI Order.

11. We note further that, in a separate order,[4] we have granted CWI nondominant carrier status for the provision of IMTS on routes on which it resells the IMTS of other U.S. carriers, including the U.S.-Hong Kong route. As a result of its nondominant carrier status, we have removed in that order the condition imposed in this proceeding that CWI seek additional Section 214 authority to resell the international switched voice services of TRT/FTC offered pursuant to any future modifications of the September 3 contract. We reiterate here, however, the continuing obligation of all U.S. international carriers to file publicly and make generally available their common carrier service offerings to similarly situated customers at the same terms, conditions, and rates.

12. Finally, AT&T requests that we impose two additional conditions on CWI in its provision of resold switched voice service from the United States to Hong Kong: (1) prohibit TRT/FTC from receiving more than its fair share of return traffic from Hong Kong Telecom;[5] and (2) prohibit TRT/FTC from receiving special treatment from CWI, Hong Kong Telecom or their affiliates. We decline to impose these conditions on TRT/FTC in this Order. TRT/FTC is not before us in this proceeding. We therefore do not have authority in this proceeding to condition its operations in the way that AT&T requests. We note, however, that the Commission requires that U.S. international carriers accept only their proportionate share of return traffic. *Regulation of International Accounting Rates*, 7 FCC Rcd 8040, 8045 (1992), *recon. pending*.

13. As to AT&T's second requested condition -- prohibiting TRT/FTC from receiving special treatment from CWI, Hong Kong Telecom or their affiliates -- the Commission previously rejected the suggestion that it should require all U.S. international carriers to certify that they have not agreed to accept special concessions from foreign carriers or administrations with respect to U.S. international traffic or revenue flows and have not agreed to enter into such agreements in the future. *International Services*, 7 FCC Rcd at 7344 n.55. In so doing, the Commission nonetheless indicated that in specific instances it has "prohibited U.S. international carriers from negotiating exclusive arrangements with foreign carriers or administrations and retain[s] the authority to do so in particular authorizations." In any event, we note that in this case, TRT/FTC is already subject to such a condition in its cable landing license for the TPC-5 cable system. *See American Telephone and Telegraph Company, et al.*, File No. SCL-92-005, 7 FCC Rcd 7674 (1992) (*TPC-5 Cable Landing License*). This cable landing license is made applicable to the Hong Kong route in the related Section 214 authority.[6] Specifically, the *TPC-5 Cable Landing License* requires that:

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[4] *See supra* note 2.

[5] As evidence of the need for the requested condition, AT&T claims in a footnote in its reply that TRT/FTC in the past has received a disproportionate share of return traffic to the United States. AT&T Reply, at 5 n.3. AT&T, however, failed to substantiate this assertion. The data on which AT&T relies -- the "International Communications Traffic Data Report for 1990" -- do not measure percentage of return traffic.

[6] *American Telephone and Telegraph Company, et al.*, File No. ITC-92-179, 7 FCC Rcd 7758 (1992) (*TPC-5 214 Order*).

> Licensees . . . shall not acquire or enjoy any right, for the purpose of handling traffic to or from the United States . . . to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensees or any persons or companies controlling them or controlled by them are parties....

7 FCC Rcd at 7675. We believe that this provision in the cable landing license of TRT/FTC addresses AT&T's concern.

ORDERING CLAUSES

14. Accordingly, IT IS ORDERED THAT the Petition for Clarification filed by AT&T is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Deputy Bureau Chief,
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition of Cable & Wireless, Inc. for Nondominant Status on All Routes Employing Resold International Message Telecommunications Services of Unaffiliated U.S. Carriers

File No. ISP-93-006-ND

MEMORANDUM OPINION AND ORDER

Adopted: October 7, 1994; Released: October 21, 1994

By the Deputy Bureau Chief, Common Carrier Bureau:

1. Cable & Wireless, Inc. (CWI)[1] has filed a petition for modification of its regulatory classification from dominant to nondominant for the provision of international message telephone service (IMTS) on routes where CWI resells the IMTS of U.S. facilities-based carriers. Since 1985, we have authorized CWI to provide IMTS on numerous international routes through the resale of switched services provided by U.S. facilities-based carriers.[2] CWI has been subject to dominant carrier status on all international routes because CWI's ultimate parent, Cable & Wireless plc, is a foreign (U.K.) corporation.[3] CWI now seeks to modify its status from dominant to nondominant for the routes on which it employs resold IMTS of U.S. facilities-based carriers. CWI's request includes service between the United States and Canada, where CWI also provides service on a facilities basis. CWI urges that because it has no ownership interest in any carrier in Canada, the Commission may grant CWI nondominant status for the provision of IMTS services using its own U.S. facilities as well as those that are resold. CWI filed this petition pursuant to the Commission's Order in *Regulation of International Common Carrier Services*, 7 FCC Rcd 7331 (1992) (*International Services*), *errata*, DA 93-26, released January 19, 1993, and Section 63.13 of the Commission's Rules, 47 C.F.R. § 63.13. American Telephone and Telegraph Company (AT&T) filed a formal opposition to CWI's petition. For the reasons stated below, we grant CWI's petition for all routes on which it resells IMTS, with the exception of Canada.

BACKGROUND

2. The Commission imposed dominant carrier status on all "foreign-owned" U.S. carriers in their provision of all international services to foreign markets in *International Competitive Carrier*, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986). It defined "foreign-owned" as any U.S. carrier that is over fifteen percent directly or indirectly owned by a foreign telecommunications entity or on whose board of directors a representative of the foreign telecommunications entity sits. *Id.* at 842 n.74.

3. In *International Services*, the Commission found this policy overbroad and unnecessarily burdensome. The Commission therefore decided to regulate a U.S. international carrier, whether U.S. or foreign-owned, as dominant only on those routes where a "foreign affiliate" of the carrier has the ability to discriminate against unaffiliated U.S. carriers in the provision of services or facilities used to terminate U.S. international traffic in the destination market.[4] 7 FCC Rcd at 7332. The Commission revised Section 63.01(r) of its rules to require each applicant for international Section 214 authority to certify whether it has an affiliation with a foreign carrier. A U.S. carrier is an "affiliate" of a foreign carrier when the U.S. carrier controls, is controlled by, or is under common control with, a foreign carrier. 7 FCC Rcd at 7332-33.

4. For purposes of classifying a U.S. carrier as dominant or nondominant on a particular route, the Commission established the following presumptions: (1) a carrier that has no affiliate on the foreign end is presumed nondominant; (2) a carrier that has an affiliate on the foreign end that is a monopoly is presumed dominant; and (3) a carrier that is affiliated on the foreign end with a carrier that is not a monopoly bears the burden of submitting information sufficient to demonstrate that its foreign affiliate is unable to discriminate against unaffiliated U.S. carriers through control of bottleneck facilities in the destination country. 7 FCC Rcd at 7334; 47 C.F.R. § 63.10 (a)(1)-(3). The Commission further determined in *International Services* that all U.S. international carriers that merely resell the switched services (including IMTS) of other U.S. carriers on a particular route would be presumed nondominant without regard to any foreign affiliations. 7 FCC Rcd at 7335; 47 C.F.R. § 63.10 (a)(4).

5. CWI petitions for nondominant status on its IMTS routes because it provides IMTS on a resale basis and it has no affiliated carriers, with the exception of Canada where CWI holds a direct service Section 214 authorization in its own right and in conjunction with other carriers.[5] CWI Petition, at 1. Further, CWI certifies that it has not agreed to any special concessions on any of its routes. *Id.*, Attachment 3.

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[1] When the subject Petition was filed, CWI was formally called "Cable & Wireless Communications, Inc." Subsequently, CWI changed its name to "Cable & Wireless, Inc." *See* Letter from CWI to the Commission, dated September 15, 1993.

[2] *See* CWI Application For Streamlined Modification of Dominant Status, at 2.

[3] As a dominant carrier, CWI must obtain Commission approval before adding circuits on existing routes; file cost support with tariff filings; file tariffs on 45 days' notice; and file country specific traffic and revenue reports on a quarterly, rather than annual, basis.

[4] This change in policy did not modify the dominant carrier status for the provision of certain international services of AT&T, Comsat or U.S. carriers that provide international service for non-contiguous domestic points. 7 FCC Rcd at 7342 n.2.

[5] CWI also requests that the Commission grant its petition for nondominant status on a streamlined basis on all routes over which it provides IMTS through resale of service acquired from an unaffiliated carrier. Streamlined processing, however, is not available here because the petition was formally opposed. *See* 47 C.F.R. § 63.12(c)(4).

6. AT&T opposes the CWI application, arguing that it "would bestow additional non-reciprocal benefits on CWI in the form of streamlined regulatory treatment of its U.S. service operations, while other U.S. carriers are precluded by legal and market barriers from competing with CWI affiliates in foreign markets, and notwithstanding the fact that CWI affiliates maintain above cost and discriminatory accounting rates with U.S. carriers." AT&T Opp. at 1. AT&T requests that the Commission refrain from any decision on CWI's request until "U.S. public interest implications of asymmetric market access are investigated and resolved."[6] *Id.* at 2. AT&T also requests that the Commission condition any future grant of nondominant status for CWI on the establishment of non-discriminatory, cost-based accounting rates for U.S. carriers in all markets controlled by CWI affiliates.

7. CWI responds that AT&T's opposition raises market entry issues where none exists. CWI states that it has been authorized to resell international switched service since 1985 and that it does not here seek to expand its authorization. CWI maintains that the only issue raised by its application is regulatory status. CWI Response at 4. CWI argues that the U.S. Trade Representative supports the Commission's proposal to streamline the regulation of U.S. international carriers and that "reclassification of CWI will bring the U.S. closer to parity with the U.K.'s exceptionally liberal treatment of resellers, including those which are U.S.-based." *Id.* at 5-6. CWI urges that the Commission not consider accounting rate issues in this proceeding because they are being considered elsewhere. *Id.* at 8.

DISCUSSION

8. We grant CWI's request for change of status from dominant to nondominant for the provision of IMTS on all routes on which it resells the IMTS of other U.S. carriers, with the exception of Canada. Section 63.10(a)(4) of the Commission's Rules provides that, where a U.S. international carrier provides a particular service on a particular route solely through the resale of the switched services of a U.S. facilities-based carrier with which it has no affiliation, the resale carrier shall presumptively be classified as nondominant in its provision of such service. This presumption applies to CWI in its provision of IMTS via IMTS resale on all of its authorized routes, with the exception of Canada, where CWI also offers IMTS on a direct service basis.

9. Turning first to those routes on which CWI offers IMTS solely as a resale carrier, we find that AT&T has not submitted evidence sufficient to overcome the presumption of nondominance.[7] With the exception of the U.S.-Hong Kong route, AT&T has failed to submit any evidence that rebuts (or even relates to) this presumption. On the contrary, AT&T's principal contention centers on market entry, an issue that is not before us in this proceeding. CWI is an authorized U.S. international resale carrier. It requests in its application that the Commission modify its regulatory status as a resale carrier consistent with the rules adopted in *International Services*. We find in this record no rational basis for not implementing rules, duly adopted by the Commission, that will result in the elimination of unnecessary regulation.

10. With respect to the U.S.-Hong Kong route, AT&T argues that CWI's Hong Kong affiliate has returned a disproportionate share of return traffic to TRT/FTC, perhaps in exchange for that carrier offering CWI a favorable price for resale of TRT/FTC's services. In support of its allegation of discrimination by CWI's Hong Kong affiliate, AT&T incorporates by reference an earlier pleading in a related matter (File No. ITC-88-157).[8] In a separate order denying AT&T's petition, we find that AT&T has not produced any evidence that would even tend to suggest any such discrimination has occurred.[9] Accordingly, we find that AT&T has failed to carry its burden to overcome the presumption established by Section 63.10(b) of the Commission's rules that CWI is nondominant on the U.S.-Hong Kong route for the provision of its authorized switched services provided via IMTS resale.

11. In light of our decision to modify CWI's regulatory status on the U.S.-Hong Kong route for the provision of resold IMTS, we remove the condition imposed in File No. ITC-88-157 that CWI seek additional Section 214 authority to resell the IMTS of TRT/FTC offered pursuant to any modifications of the contract filed in that proceeding.[10] Nondominant U.S. international carriers are required only to file an initial application under Section 63.01 in order to provide a particular product to a particular geographic market.[11]

12. Although CWI provides IMTS to Canada on both a resale and direct service basis, it is still entitled to a presumption of nondominance. Section 63.10(a)(1) of the Rules provides for such a presumption where a U.S. international carrier has no affiliation with a foreign carrier in the destination market. CWI notes that its corporate parent, Cable & Wireless North America, Inc., sold its entire interest in Cable & Wireless Telecommunications, a Canadian reseller, on March 4, 1993. We note, however, that since the filing of CWI's petition, Bell Canada Enterprises has purchased a 20 percent stake in CWI's U.K. affiliate, Mercury Communications.[12] We will therefore defer consideration of CWI srequest for nondominant status in its provision of IMTS to Canada in order to examine further the

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[6] Subsequent to filing in this proceeding, AT&T submitted to the Commission a Petition for Rulemaking requesting amendment of the Commission's Rules relating to the market entry and regulation of international common carriers with foreign carrier affiliations. The Commission issued public notice of AT&T's petition (RM-8355) on October 1, 1993. *See* Report No. 1975. Comments and reply comments were filed on November 1 and 16, 1993, respectively.

[7] Section 63.10(b) places the burden of proof on any party that seeks to defeat the presumptions set forth in paragraph (a) of that section.

[8] Petition for Clarification and Reply to Opposition in File No. ITC-88-157, Cable & Wireless Communications, Inc., Order, Authorization and Certificate, 7 FCC Rcd 4384 (CCB 1992).

[9] Cable & Wireless, Inc., Order On Clarification, DA 94-1132, adopted October 7, 1994.

[10] 7 FCC Rcd at 4384.

[11] *See* International Competitive Carrier, 102 FCC2d 812, 845 (1985), *recon. denied*, 60 RR2d 1435 (1986).

[12] Chairman's Statement, Cable & Wireless, 1993 Annual Report. Bell Canada Enterprises is the parent of Bell Canada, Canada's largest local telephone company and the largest shareholder of Stentor, an alliance of regional telephone companies that provides local and long distance services in Canada,

potential implications of this acquisition for CWI's U.S. operations and for the U.S. telecommunications market generally.

13. We decline to condition CWI's change in regulatory status on implementation of accounting rate reform by CWI's affiliated foreign carriers. The *International Services* decision did not adopt any such condition as a prerequisite for nondominant status. Moreover, the Commission has stated that, while it clearly is concerned about accounting rate disparities, it would, for now, rely on mechanisms other than conditioning Section 214 authorizations to encourage foreign correspondents to lower their accounting rates with U.S. carriers.[13]

ORDERING CLAUSES

14. Upon consideration of the petition and in view of the foregoing, IT IS HEREBY ORDERED THAT application File No. ISP-93-006-ND IS GRANTED, and CWI is authorized to provide IMTS as a nondominant international carrier on routes on which it resells the IMTS of U.S. carriers with which it has no affiliation, with the exception of Canada.

15. IT IS FURTHER ORDERED THAT the requirement that CWI seek specific additional authority from the Commission to resell the international switched voice services of TRT/FTC offered pursuant to any modification of the contract between TRT/FTC and CWI dated September 3, 1991 (CWI Order, 7 FCC Rcd at 4384, at para. 8), is REMOVED in view of our decision in this proceeding.

16. IT IS FURTHER ORDERED that CWI's request to modify its classification from dominant to nondominant for the provision of IMTS between the United States and Canada is hereby deferred.

17. IT IS FURTHER ORDERED that the Opposition filed by AT&T is DENIED IN PART and DEFERRED IN PART.

18. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Deputy Bureau Chief,
Common Carrier Bureau

as well as international traffic between the United States and Canada. Stentor Telecom Policy Inc., "The Telecommunications Service Industry in Canada" (rev. ed. May 1993). Bell Canada Enterprises also is a 19.8 percent shareholder of Teleglobe, Inc., Canada's monopoly overseas carrier. *Id.*

[13] See *Telefonica Larga Distancia de Puerto Rico*, 8 FCC Rcd 106, 112 at para. 27 (1992) (citing *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, *Second Report & Order and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 8040, 8046 at para. 32 (1992)).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition of Cable & Wireless, Inc. for Nondominant Status on International Private Line Routes

File No. ISP-93-007-ND

MEMORANDUM OPINION AND ORDER

Adopted: October 7, 1994; Released: October 21, 1994

By the Deputy Bureau Chief, Common Carrier Bureau:

1. Cable & Wireless, Inc. (CWI)[1] has filed a petition for modification of its regulatory classification from dominant to nondominant with respect to those authorized noninterconnected, international private line service (IPLS) routes where: (1) no CWI group company[2] holds an ownership interest in any carrier in the destination country; or (2) no CWI group company holds an ownership interest in a carrier that is a monopoly that controls bottleneck services or facilities in the destination country. This petition covers 34 IPLS routes on which CWI has no ownership interest in any foreign carrier in the destination market.[3] It also covers four routes where, according to CWI, it has a commonly-owned foreign carrier that is subject to competition and does not control bottleneck services or facilities: the United Kingdom, Australia, Sweden, and Japan.

2. CWI is a U.S. domestic long distance and international common carrier providing a wide range of switched and private line services. We have authorized CWI to provide noninterconnected IPLS on a resale basis to over 40 countries.[4] We have also authorized CWI to provide noninterconnected IPLS to Canada on a direct service basis.[5] CWI has been subject to dominant carrier status on all U.S. international routes because CWI's ultimate parent, Cable & Wireless plc, is a U.K. corporation.[6] CWI filed this petition pursuant to the Commission's Order in *Regulation of International Common Carrier Services*, 7 FCC Rcd 7331 (1992) (*International Services*), *errata*, DA 93-26, released January 19, 1993, and Section 63.13 of the Commission's Rules, 47 C.F.R. § 63.13. American Telephone and Telegraph Company (AT&T) filed a formal opposition to CWI's petition.

3. We grant CWI's petition for 33 of the IPLS routes on which it holds no ownership interest in any carrier in the destination country for the reasons stated below. We defer taking action on the Canadian IPLS route, on the four IPLS routes on which CWI holds an ownership interest in a foreign carrier, and on the Russia and Latvia routes.[7]

BACKGROUND

4. The Commission imposed dominant carrier status on all "foreign-owned" U.S. carriers in their provision of all U.S. international services to all foreign markets in *International Competitive Carrier*, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986). It defined "foreign-owned" as any U.S. carrier that is over fifteen percent directly or indirectly owned by a foreign telecommunications entity or on whose board of directors a representative of a foreign telecommunications entity sits. *Id.* at 842 n.74.

5. In *International Services*, the Commission found this policy overbroad and unnecessarily burdensome. The Commission therefore decided to regulate a U.S. international carrier, whether U.S. or foreign-owned, as dominant only for those routes on which a "foreign affiliate" of the carrier has the ability to discriminate against unaffiliated U.S. carriers in the provision of services or facilities used to terminate U.S. international traffic in the destination market.[8] 7 FCC Rcd at 7332. The Commission revised Section 63.01(r) of its rules to require each applicant for international Section 214 authority to certify whether it has an affiliation with a foreign carrier. A U.S. carrier is an "affiliate" of a foreign carrier when the U.S. carrier controls, is controlled by, or is under common control with a foreign carrier. 7 FCC Rcd at 7332-33.

6. For purposes of classifying a U.S. carrier as dominant or nondominant on a particular route, the Commission established the following presumptions: (1) a carrier that has no affiliate on the foreign end is presumed nondominant; (2) a carrier that has an affiliate on the foreign end that is a monopoly is presumed dominant; and (3) a carrier that is affiliated on the foreign end with a carrier that is not a monopoly bears the burden of submit-

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[1] When the subject Petition was filed, CWI was formally called "Cable & Wireless Communications, Inc." Subsequently, CWI changed its name to "Cable & Wireless, Inc." *See* Letter from CWI to the Commission, dated September 15, 1993.

[2] CWI is a wholly-owned subsidiary of Cable & Wireless North America, Inc., which, in turn, is a wholly-owned subsidiary of Cable & Wireless plc, a publicly-traded U.K. corporation. CWI group companies include Cable & Wireless plc and its subsidiaries. A listing of these companies is appended to CWI's Petition at Attachment 3.

[3] The authorized private line routes on which CWI has no commonly-owned foreign carrier are Argentina, Austria, Belgium, Brazil, Canada, Chile, Colombia, Denmark, Dominican Republic, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, South Korea, Former Soviet Republics (excluding Russia and Latvia), Spain, Switzerland, Taiwan, Turkey and the Former Yugoslav Republics.

[4] *See Cable & Wireless Communications, Inc.*, 8 FCC Rcd 1664 (Com. Car. Bur. 1993).

[5] *Id.*

[6] As a dominant U.S. international carrier, CWI must obtain Commission approval before adding circuits on existing routes; file cost support with tariff filings; file tariffs on 45 days' notice; and file country specific traffic and revenue reports on a quarterly, rather than annual, basis.

[7] CWI filed a request to defer consideration of the status of Russia and Latvia. *See* CWI Request and Certification, filed May 20, 1994.

[8] This change in policy did not modify the dominant carrier status for the provision of certain international services of AT&T, Comsat or U.S. carriers that provide international service for non-contiguous domestic points. 7 FCC Rcd at 7342 n.2.

ting information sufficient to demonstrate that its foreign affiliate is unable to discriminate against unaffiliated U.S. carriers through control of bottleneck facilities in the destination country. 7 FCC Rcd at 7334; 47 C.F.R. § 63.10 (a)(1)-(3).

7. The Commission also created a presumption of nondominance for switched service resellers, regardless of any foreign affiliations,that provide service on a particular route solely through the resale of switched services of U.S. facilities-based carriers with which they have no affiliation. The Commission found that pure switched resale presented "no substantial possibility of anticompetitive effects in the U.S. international service market. . . . " 7 FCC Rcd at 7335. By contrast, the Commission declined to establish a specific presumption of nondominance for private line resellers. It explained:

> when a U.S. carrier serves a foreign market through the resale of private line service, it must obtain from the foreign carrier(s) the foreign half circuits and any necessary local or intercity access facilities or services required to terminate U.S. traffic. Even if the Commission finds that there are equivalent resale opportunities in the foreign market, a foreign carrier that owns or controls telecommunications facilities in the destination market may have sufficient market power to discriminate among U.S. carriers in provisioning and pricing.

7 FCC Rcd at 7336 (footnote omitted).

8. CWI asserts that, pursuant to Section 63.10(a)(1) of the Commission's Rules, it is entitled to a presumption of nondominant status on the 34 noninterconnected, resold IPLS routes where it has no foreign carrier affiliate in the destination country. In support, CWI submits a certified list of ownership information and a list of interlocking directorates, as required by Section 63.01(r)(2) of the Commission's Rules.

9. AT&T filed the sole opposition, arguing that nondominant status "would bestow additional non-reciprocal benefits on CWC in the form of streamlined regulatory treatment of its U.S. private line service operations, while other U.S. carriers are precluded by legal and market barriers from competing with CWC affiliates in foreign markets." AT&T Opp. at 1. AT&T requests that the Commission refrain from any decision on CWI's request until "U.S. public interest implications of asymmetric market access are investigated and resolved."[9] *Id.* at 2. AT&T also emphasizes that regulatory decisions and trade negotiating objectives are linked, and that consultation and coordination of such decisions and policy are necessary to achieve U.S. trade objectives. *Id.* at 4.

10. CWI responds that AT&T is raising market entry issues where none exists. CWI Response at 4. CWI maintains that the only issue raised by its application is regulatory status. *Id.* CWI points out that the U.S. Trade Representative supported the Commission's proposal to streamline the regulation of U.S. international carriers. *Id.* at 5-6. According to CWI, "reclassification of CWI will bring the U.S. closer to parity with the U.K.'s exceptionally liberal treatment of resellers, including those which are U.S.-based." *Id.* at 6.

DISCUSSION

11. We grant CWI's request for change of status to nondominant for the provision of noninterconnected, resold IPLS on 33 of the authorized routes where it has certified it has no ownership interest in a carrier in the destination market. We defer taking action on the U.S.-Canada route as explained *infra*, para. 13. CWI is entitled to a presumption of nondominance on these routes pursuant to Section 63.10(a)(1) of the Commission's Rules. That Section provides that a U.S. international carrier that has no affiliation with a foreign carrier in the destination country shall presumptively be considered nondominant for the provision of international service on that route.[10]

12. We find that AT&T has not submitted evidence sufficient to overcome the presumption of nondominance on these 33 routes.[11] In fact, AT&T has failed to submit any evidence that rebuts (or even relates to) this presumption. On the contrary, AT&T's principal contention centers on market entry, an issue that is not before usin this proceeding. CWI is an authorized U.S. international carrier;[12] it seeks to modify its regulatory status as a carrier consistent with the rules adopted in *International Services*. We find on this record no rational basis for not implementing rules, duly adopted by the Commission, that will result in the elimination of unnecessary regulation.

13. We defer taking action on the four noninterconnected, resold IPLS routes (United Kingdom, Australia, Sweden and Japan) where CWI holds an ownership interest in a foreign carrier, pending our review of the specific market information. As to the Canadian route, we note that since the filing of CWI's petition, Bell Canada Enterprises has purchased a 20 percent stake in CWI's U.K. affiliate, Mercury Communications.[13] We will there-

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[9] On September 22, 1993, after AT&T filed its Opposition in this proceeding, AT&T filed a Petition for Rulemaking, requesting amendment of the Commission's Rules relating to the market entry and regulation of international common carriers with foreign carrier affiliations. The Commission issued public notice of AT&T's petition (RM-8355) on October 1, 1993. *See* Report No. 1975. Comments and reply comments were filed on November 1 and 16, 1993, respectively.

[10] *See* 7 FCC Rcd at 7334. We decline to condition CWI's change in regulatory status on implementation of accounting rate reform, as requested by AT&T. The *International Services* decision did not adopt any such condition as a prerequisite for nondominant status. Moreover, the Commission recently stated that although it clearly is concerned about accounting rate disparities, it would, for now, rely on mechanisms other than conditioning Section 214 authorizations to encourage foreign correspondents to lower their accounting rates with U.S. carriers. *See Telefonica Larga Distancia de Puerto Rico*, 8 FCC Rcd 106, 112 at para. 27 (1992) (citing *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, *Second Report & Order and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 8040, 8046 at para. 32 (1992)).

[11] Section 63.10(b) places the burden of proof on any party that seeks to defeat the presumptions set forth in paragraph (a) of that section.

[12] *See* notes 4 & 5, *supra*.

[13] Chairman's Statement, Cable & Wireless, 1993 Annual Report. Bell Canada Enterprises is the parent of Bell Canada, Canada's largest local telephone company and the largest shareholder of Stentor, an alliance of regional telephone companies that provides local and long distance services in Canada, as well as international service between the United States and

fore defer consideration of CWI's request for nondominant status in its provision of noninterconnected IPLS to Canada in order to examine further the potential implications of this acquisition for CWI's U.S. operations and for the U.S. telecommunications market generally. We also defer taking action on the routes for Russia and Latvia, per the request of CWI.[14]

ORDERING CLAUSES

14. Upon consideration of the petition and in view of the foregoing, IT IS HEREBY ORDERED THAT application File No. ISP-93-007-ND IS GRANTED IN PART, and CWI is authorized to provide noninterconnected, resold IPLS as a nondominant international carrier on 33 of its authorized routes where it has no ownership interest in a carrier in the destination country. Those routes are Argentina, Austria, Belgium, Brazil, Chile, Columbia, Denmark, Dominican Republic, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, South Korea, Former Soviet Republics (excluding Russia and Latvia), Spain, Switzerland, Taiwan, Turkey and the Former Yugoslav Republics.

15. IT IS FURTHER ORDERED that CWI's request to modify its classification from dominant to nondominant for the provision of noninterconnected IPLS to Canada, the United Kingdom, Australia, Sweden, Japan, Russia and Latvia IS DEFERRED.

16. IT IS FURTHER ORDERED that the Opposition filed by AT&T is DENIED IN PART and DEFERRED IN PART.

17. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Deputy Bureau Chief,
Common Carrier Bureau

Canada. Stentor Telecom Policy Inc., "The Telecommunications Service Industry in Canada" (rev. ed. May 1993). Bell Canada Enterprises also is a 19.8 percent shareholder of Teleglobe, Inc., Canada's monopoly overseas carrier. *Id.*

[14] *See* note 7, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Seawest Yacht Brokers dba San Juan Marina
Friday Harbor, Washington — NAL/Acct. No. 215HF0019

NOTICE OF FORFEITURE

Adopted: September 28, 1994; Released: October 21, 1994

By the Commission:

I. INTRODUCTION

1. This is a Forfeiture Order issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), to Seawest Yacht Brokers dba San Juan Marina for willful violation of Section 301 of the Communications Act, 47 U.S.C. Section 301.

2. The appropriate amount of forfeiture for this violation is $400.

II. BACKGROUND

3. On August 2, 1991, an employee of the Commission's Ferndale Office intercepted transmissions on Marine Channel 68 from a coast station identified as "San Juan Marina". A review of Commission files revealed there was no record of a coast station license for San Juan Marina.

4. On March 17, 1992, the Commission issued a Notice of Apparent Liability, in the amount of $8,000, to Seawest Yacht Brokers dba San Juan Marina (herein referred to as Seawest) for violating Section 301 of the Communications Act which prohibits unlicensed radio communication. *See* 7 FCC Rcd 2479 (1992). In a letter dated April 29, 1992, Alan S. Trunnell, General Manager of San Juan Marina, admitted to unlicensed usage and requested remission of the forfeiture.

5. In his letter, Mr. Trunnell states that he later attempted to register with the FCC, but that the initial cost of the license was prohibitive and prevented him from completing the licensing process. Mr. Trunnell argues that no subsequent violations have occurred, and that he intends to apply for a license once the company is financially able. Mr. Trunnell further requests leniency since his is the only business capable of serving vessels in need, and is, therefore, providing an important service.

III. DISCUSSION

6. The violation was willful.[1] Although Mr. Trunnell claims that his company was unable to afford the initial fee for licensing, this does not change the nature of the violation. For the Commission to consider a company's financial standing as a basis for reducing the forfeiture amount, the company must provide the Commission with objective proof of income such as tax returns or other financial statements, for the most recent three years. Though Mr. Trunnell claims that San Juan Marina cannot afford to pay a fine, no documentation was provided to substantiate this assertion.

7. The Commission recognizes the attempts made by Mr. Trunnell and his staff to comply with FCC regulations since the initial violation. We note, however, that corrective action taken to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations.[2] Moreover, the FCC cannot release San Juan Marina from its legal responsibility on the basis of its lack of immediate competition.

8. The forfeiture amount was initially determined in accordance with the guidelines set forth in *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993) (the *Policy Statement)*. On July 12, 1994, the U.S. Court of Appeals for the District of Columbia Circuit vacated the *Policy Statement, USTA v. FCC*, No. 92-1321, 1994 WL 326797 (D.C. Cir. July 12, 1994). Under the circumstances, we have reconsidered the forfeiture amount in this case pursuant to Section 503(b) of the Act, which sets forth the factors that must be considered in determining the appropriate forfeiture amount. 47 U.S.C. § 503(b). Specifically, we find that, when compared to more egregious Section 301 violations where eligibility for a license in the service is at issue, the violation in the instant case is relatively minor. Further, Seawest has no prior record of violating the Act or rules. Thus, in light of the nature and circumstances of the instant case as well as no history of prior offenses by Seawest, we find that the appropriate amount for the forfeiture is $400.

IV. ORDERING CLAUSES

9. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), IT IS ORDERED that Seawest FORFEIT to the United States the sum of four hundred dollars ($400) for willful violation of Section 301 of the Communications Act. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The payment should be marked with the NAL/Acct. No. 215HF0019 and mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, IL 60673-7482

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[1] Section 312(f)(1) of the Act, which also applies to Section 503(b), provides: The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United k+*States. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

[2] *See Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

10. IT IS FURTHER ORDERED that a copy of this Order shall be sent by certified mail, return receipt requested, to Seawest Yacht Brokers dba San Juan Marina, P.O. Box 340, 2nd Spring Street West, Friday Harbor, Washington 98250.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Special Relief of PEOPLE'S CABLE, INC. and — CSR-4279-T

Petition for Special Relief of PEOPLE'S CABLE, INC. and AMERICAN TELECASTING OF CENTRAL FLORIDA, INC. — CSR-4286

For Waivers of Section 76.502, 74.931 and 21.912 of the Commission's Rules, 47 C.F.R. §§ 76.502, 74.931 and 21.912

MEMORANDUM OPINION AND ORDER

Adopted: September 14, 1994; Released: October 21, 1994

By the Chief, Cable Services Bureau and the Chief, Mass Media Bureau:

1. On July 8, 1994, People's Cable, Inc. ("PCI"), filed a petition for special relief, requesting a waiver of the Commission's anti-trafficking rule, 47 C.F.R. § 76.502(a) in order to transfer one cable system in the Lakeland, Florida area to American Telecasting of Central Florida, Inc. ("ATCF"). Also on July 8, 1994, PCI and ATCF jointly filed a petition for a declaratory ruling or for special relief with respect to the Commission's cross-ownership rules, 47 C.F.R. § § 21.912 and 74.931(h), to permit the proposed transaction to proceed. Both petitions are unopposed.

2. Section 76.502 of the Commission's Rules implements Section 617 of the Communications Act of 1934, as amended, (the "Act"), 47 U.S.C. § 537. Section 617(a) of the Act establishes a three-year holding requirement for cable systems and, with certain exceptions, restricts the ability of a cable operator to sell or otherwise transfer ownership in a cable system within a 36 month period following either the acquisition or initial construction of the system. 47 U.S.C. § 537(a). The anti-trafficking provision is intended to restrict profiteering transactions and other transfers that are likely to adversely affect cable rates or service in the local franchise area, but is not intended to inhibit investment in the cable industry or delay or disrupt legitimate cable transactions. *See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, First Report and Order*, 8 FCC Rcd 6828 at paras. 11, 21 and 36 (1993). Accordingly, application of the three-year holding requirement is limited to situations involving substantial changes in ownership which constitute a transfer of control. *Id.*, 8 FCC Rcd at para. 23. In addition to directing that waivers shall be granted in cases of default, foreclosure or other financial distress, Section 617(d) provides the Commission with broad general discretion to grant waivers on a case-by-case basis in the public interest where that would be consistent with the underlying objectives of the Act. *See* 47 U.S.C. § 537(d); *First Report and Order*, 8 FCC Rcd at para. 78.

3. Sections 21.912 and 74.931 of the Commission's Rules implement Section 613(a)(2) and (c) of the Act, 47 U.S.C. § 533, which provide, *inter alia*, that a cable operator may not hold an MMDS license in any portion of the franchise area served by that cable operator's cable system and authorizes the Commission to prescribe cross-ownership rules. Section 613(a)(2) also authorizes the Commission to waive the cross-ownership restriction as to such interests existing as of October 5, 1992 and to the extent necessary to ensure all significant portions of a franchise area are able to obtain video programming. The MMDS-cable cross-ownership restriction is intended to enhance competition and further diversity by preventing cable operators from warehousing potential sources of competition. *See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, First Report and Order*, 8 FCC Rcd 6828 at paras. 92, 101, 106 (1993) (hereinafter *First Report and Order); see also, Report and Order* in Gen. Docket Nos. 90-54 and 80-113, 5 FCC Rcd 6410, 6417 (1990), *Order on Reconsideration*, 6 FCC Rcd 6764 (1991), *Second Report and Order*, 6 FCC Rcd 6792 (1991). The Commission's implementing rules grandfather all cable-MMDS cross-ownership interests in existence as of February 8, 1990 and waive application of the restriction for all cable-MMDS cross-ownership interests, including lease arrangements, existing and permitted under the rules in effect as of October 5, 1992.[1] 47 U.S.C. § 613(a)(2)(A); 47 C.F.R. § 21.912(e)(2). The Commission also has broad authority to waive the cross-ownership and cross-interest restrictions. 47 U.S.C. § 613(a)(2)(B); *First Report and Order*, 6 FCC Rcd at para. 93.

4. *Anti-trafficking.* PCI owns and operates a cable system in the Lakeland, Florida area serving 2,630 subscribers pursuant to three non-exclusive franchises. The system's headend serves 1304 subscribers in the City of Lakeland, 80 subscribers in the City of Mulberry, and 1246 subscribers in Polk County.[2] The Lakeland cable system has been managed by Patrick D. McConnell since the late 1980's. Three years ago, from May of 1991 until March of 1992, Patrick McConnell and his father, Duane F. McConnell, as Trustee for the Duane F. McConnell Revocable Trust, each held a 50 percent interest in PCI. On March 19, 1992, PCI issued and sold additional stock in the corporation to

[1] The rules in effect at that time included overbuild exceptions, such that the cross-interest provisions were inapplicable if the cable operator was not the sole provider of cable service in the franchise area. *See* 47 C.F.R. § § 21.912 and 74.931 (1991). As used herein, the term cross-interest refers to cable companies' interests in lease agreements with ITFS and MDS/MMDS licensees, as contrasted with cable companies' ownership of MDS/MMDS licenses. Section 613 of the Act only restricts cable-MDS cross-ownership, while the Commission's Rules restrict both cross-ownerships and cross-interests.

[2] PCI was awarded a non-exclusive franchise by the City of Lakeland on July 18, 1988, which was renewed June 15, 1992, by the City of Mulberry on April 13, 1989 and by Polk County on July 12, 1988.

outside investors, diluting the McConnell's combined interest in PCI from 100% to 75% and resulting in a transfer of negative control within PCI.[3]

5. PCI recently entered into an agreement with ATCF and American Telecasting, Inc. ("ATI"), ATCF's parent, pursuant to which PCI would be merged into ATCF and ATCF would assume control over the operations of PCI's cable and wireless systems. The franchise authorities for the three franchises served by PCI's Lakeland headend have each approved the proposed transfer of PCI to ATCF.[4]

6. Because PCI's March 1992 stock issuance resulted in a transfer of negative control, PCI seeks a waiver of the three-year holding requirement in order to now consummate the proposed merger with ATCF. PCI asserts that grant of a waiver is in the public interest because actual operational control of the cable system has resided with the McConnell's for over three years. PCI states that the 1992 stock issuance provided an infusion of capital to the company, but that (1) day-to-day managerial control remained with the McConnell's and (2) the McConnell's retained a combined majority interest in the company. PCI also asserts that a waiver is in the public interest because the proposed assignment to ATCF is for legitimate business reasons unrelated to the profiteering concerns of the anti-trafficking provision. In particular, PCI states that: (1) the number of cable subscribers served in each of the three franchise areas served by the cable system is relatively minimal; (2) the total number of cable subscribers amounts to only one third of the total number of wireless cable subscribers involved in the proposed transaction; and (3) the sale of the cable system is incidental to the sale of the wireless cable system.[5] Finally, PCI asserts that ATCF is an experienced operator with the necessary financial resources to ensure continued service and to expand service.

7. We will grant PCI's request for a waiver of the anti-trafficking rules. We note that the transfer of control necessitating this waiver was a transfer of negative control which occurred two and a half years ago and that the evidence suggests *de facto* control of the cable system has remained with the same two owners of PCI for well over three years. The evidence thus suggests that this transaction does not invoke the profiteering concerns underlying the anti-trafficking provision. We also note that each of the franchise authorities has consented to the transaction and that the waiver request is unopposed. Based upon the totality of the evidence, we find that grant of the requested waiver of the three-year holding requirement to permit the merger of PCI into ATCF would be consistent with the public interest and our obligations pursuant to Section 617(d) of the Act.[6]

8. *Cross-Ownership.* PCI also owns and operates a 27 channel wireless cable system serving approximately 8,200 subscribers in the Lakeland, Florida area.[7] All of the wireless system's channel capacity is leased capacity.

9. PCI states that all of its lease agreements comply with the Commission's Rules because they are either grandfathered or exempt from the cross-ownership/cross-interest rules because they were entered into prior to the effective date of the cross-ownership provision of the 1992 Cable Act and complied with the cross-interest rules then in effect. In particular, PCI states that (1) the MDS lease agreement with Delta-Band Services, Ltd., is grandfathered because it was executed prior to February 8, 1990, the effective date of the cross-interest restrictions of Section 21.912 of the Commission's Rules; (2) the remaining ITFS lease agreements are exempt from the cross-interest restrictions of Section 74.931(h) of the Commission's Rules because PCI is not the sole provider of cable television service in the franchise area;[8] and (3) subsequent to the effective date of the cross-interest rules, the Commission has granted applications and amendments pertaining to the channels which included requests for waiver of the cross-interest rules.

10. PCI and ATCF seek confirmation that the proposed merger of PCI into ATCF does not require Commission action for the merged entity to enjoy PCI's existing exemptions to the cross-interest rules or, alternatively, PCI and ATCF request waivers of Sections 21.912(b) and 74.931(h) in order to allow the merged entity to continue in PCI's shoes as the owner and operator of both the Lakeland cable system and the wireless system. PCI and ATCF assert that there is no material change in the circumstances that formed the basis for the availability of the exceptions in the first place and therefore the existing waivers should be allowed to follow PCI into the merged entity. PCI and ATCF argue that, in any event, the Commission's authority to waive the cross-interest rules is even greater than its broad authority to waive the cross-ownership rules. PCI and ATCF contend that if waivers are deemed necessary, their grant would serve the public interest because: (1) the transaction does not involve the warehousing concerns underlying the cross-ownership restrictions; (2) PCI's wireless and non-exclusive franchise cable operations directly compete with other cable companies in the Lakeland area, including Time-Warner, Storer and Paragon, and as a result of this competition PCI has no market power in its cable franchise area; (3) ATCF does not operate or have an attributable interest in any cable system in the Lakeland area and will have no greater market power than did PCI, thus eliminating any concerns regarding potential

[3] Pursuant to the stock sale, the ownership of PCI was as follows: Patrick D. McConnell, 37.5%; Duane F. McConnell, Trustee, 37.5%; John P. Imlay, Jr., 19.9%; Wesley Eugene Kelly, 4.5%; I. Sigmund Mosley, Jr., 0.6%. Patrick D. McConnell represents in a declaration appended to the petition that minor changes in the stock ownership of PCI have occurred since March of 1992, but none of the changes, individually or collectively, have constituted a transfer of control of PCI.

[4] PCI submitted copies of resolutions adopted by the franchise authorities consenting to the proposed transfers.

[5] PCI notes that ATI and its subsidiaries either operate or are developing wireless cable systems throughout Florida and their primary interest is in the wireless industry, not the cable industry.

[6] Consent to the assignment of CARS Stations WHZ-785 and WHZ-784, from PCI to ATCF, was granted September 1, 1994.

[7] On December 31, 1992, PCI acquired the Lakeland wireless system in a merger with 5515, Inc., an identically-owned sister corporation of PCI. The Lakeland wireless system began operation in 1989 as a four channel system.

[8] PCI represents that both the wireless system and the cable system compete with other cable operators in the Lakeland area. In particular, PCI represents that its cable service directly competes with other cable operators within the Polk County and the City of Lakeland franchise areas. In the City of Mulberry, where PCI serves 80 cable subscribers, PCI currently is the sole provider of cable service.

anticompetitive consequences; and (4) permitting the merger to go forward will enhance the competitiveness of wireless cable operations in the Lakeland area.

11. With regard to Section 74.931 of the Commission's Rules, PCI and ATCF are correct that no waiver of the cross-interest restriction is necessary for Lakeland or Polk County. PCI and ATCF represent that PCI is not the sole provider of cable service in these franchise areas and ATCF does not operate or hold any attributable interest in any cable system serving the Lakeland area. Therefore, under Section 74.931(h) of the Commission's Rules, the proposed assignment of the ITFS lease agreements to ATCF falls within the exception to that cross-interest rule as to those cable franchise areas.[9] However, PCI currently is the sole provider of cable service in the City of Mulberry and a waiver of the cross-interest restriction is thus required. Based upon the totality of the evidence, including that PCI serves only 80 cable subscribers in Mulberry which is a less than 1% of the number of wireless cable subscribers involved in the transaction, that ATCF has demonstrated a commitment to develop wireless cable operations and warehousing concerns are thus not implicated, and a waiver will permit continued operation of the extant wireless system, we find that grant of a waiver of Section 74.931 is warranted, will serve the public interest and is consistent with our obligations pursuant to Section 613 of the Act.

12. With regard to Section 21.912 of the Commission's Rules and the MDS lease, the cross-interest restriction applies to the proposed assignment of the lease to ATCF. *See Second Report and Order* in Gen. Doc. No. 90-54, 6 FCC Rcd 6792, para. 39 (1991). However, based upon the totality of the evidence presented, including that the transaction does not implicate warehousing concerns and a waiver will permit the continued uninterrupted operation of the existing wireless system, we find that grant of a waiver of Section 21.912(b) will serve the public interest and is consistent with our obligations pursuant to Section 613 of the Act.

13. These waivers are granted only to American Telecasting of Central Florida, Inc. The cable/MMDS and cable/ITFS cross interest restrictions of Sections 21.912 and 74.931 will apply to any proposed assignee(s) or transferee(s).

14. In view of the foregoing, IT IS ORDERED that, pursuant to 47 C.F.R. § 0.321, the request for waiver of 47 C.F.R. § 76.502(a) IS GRANTED with respect to the proposed transfer of the Lakeland cable system from Peoples Cable, Inc., to American Telecasting of Central Florida, Inc.

15. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. § 0.283, the request for waiver of 47 C.F.R. § 21.912(b) is GRANTED to American Telecasting of Central Florida, Inc.

16. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. § 0.283, the request for a waiver of 47 C.F.R. § 74.931 is GRANTED to American Telecasting of Central Florida, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Roy J. Stewart
Chief, Mass Media Bureau

[9] We do not rule herein on the question of whether in the context of a merger the benefits of an extant cross-interest waiver can be transferred to and retained by the merged entity without Commission consent or issuance of a new waiver.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Harshad Parikh,
Complainant,

v.

AT&T Corp.,
Defendant.

File No. E-94-82

ORDER

Adopted: October 13, 1994; Released: October 21, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On February 10, 1994, Mr. Harshad Parikh filed the above-captioned formal complaint against AT&T Corp. (AT&T). The complainant alleged that AT&T had unlawfully charged him for international services. On October 12, 1994, the parties filed a joint motion to dismiss with prejudice, stating that a mutually agreeable settlement had been reached.

2. We are satisfied that granting the parties' motion to dismiss the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-23

In the Matter of

Amendment of Section 73.202(b) RM-8439
Table of Allotments,
FM Broadcast Stations.
(Mabton, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 12, 1994; Released: October 21, 1994

By the Acting Chief, Allocations Branch:

1. At the request of First Love Ministries, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 1537 (1994), proposing the allotment of Channel 254A at Mabton, Washington, as the community's first local aural transmission service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 254A at Mabton, Washington, since it would provide the community with its first local aural transmission service. An engineering analysis has determined that Channel 254A can be allotted at Mabton in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Since Mabton is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Mabton, Washington	254A

4. The window period for filing applications will open on **December 5, 1994**, and close on **January 5, 1995**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, petitioner's request, although signed and an address provided, did not verify the statements contained in the petition, as required by Section 1.52 of the Commission's Rules. Petitioner was requested to correct the deficiency in his responsive comments, and has complied accordingly.

[2] The coordinates for Channel 254A at Mabton are North Latitude 46-12-42 and West Longitude 120-00-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-121

In the Matter of

Amendment of Section 73.202(b),	RM-8530
Table of Allotments,	
FM Broadcast Stations.	
(Nashville, North Carolina)	

NOTICE OF PROPOSED RULE MAKING

Adopted: October 12, 1994; Released: October 21, 1994

Comment Date: December 12, 1994
Reply Comment Date: December 27, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Eternal Lamp, Inc. ("petitioner"), requesting the allotment of Channel 259A to Nashville, North Carolina, as the community's first local aural broadcast service. Petitioner states that it will apply for the channel, if allotted.[1]

Technical Analysis

2. Channel 259A can be allotted to Nashville in compliance with the Commission's minimum distance separation requirements without a site restriction.[2] We believe the public interest would be served by proposing the allotment of Channel 259A at Nashville since it could provide the community with its first local aural broadcast service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Nashville, North Carolina	--	259A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **December 12, 1994**, and reply comments on or before **December 27, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Tom Marino, President
Eternal Lamp, Inc.
P.O. Box 8224
Rocky Mount, NC 27804
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Petitioner notes that the Commission is exploring the possibility of instituting a "finder's preference" for a petitioner which successfully seeks the allotment of a new FM or TV station to a community. It goes on to state that if the rule is implemented before the Commission takes action on its petition, it will seek such a preference at the application stage. *See Reexamination of the Policy Statement on Comparative Broadcast Hearings* (GC Docket No. 92-52), 7 FCC Rcd 2664 (1992). However, since that docket has not been terminated, we will not consider petitioner's request for a finder's preference.

[2] The coordinates for Channel 259A at Nashville are 35-58-12 North Latitude and 77-58-00 West Longitude. We note that petitioner proposes to utilize a transmitter site 1.7 kilometers (1.1 miles) northeast, at coordinates 35-58-40; 77-57-00. However, the policy of the Commission is to allot channels which are subject to competing applications at the least restrictive site possible. *See Stuart and Boone, Iowa*, 5 FCC Rcd 4537 (1990), *recon. den.* 6 FCC Rcd 6036 (1991). Petitioner may submit its application at the site specified in its petition should the channel ultimately be allotted.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Commission's
Ex Parte Rules

ORDER

Adopted: October 7, 1994; Released: October 21, 1994

By the Commission:

1. By this Order, we amend our *ex parte* rules to provide an exemption for presentations between the Commission and the Department of Justice or Federal Trade Commission relating to telecommunications competition matters. The rules are further amended to provide for disclosure of any new factual information obtained by the Commission in such presentations if such information is relied on by the Commission in the decision-making process. This exemption would not apply if the Department of Justice or Federal Trade Commission becomes a party to the proceeding, e.g., by the filing of comments in the proceeding. Nor would it apply if the proceeding is designated for hearing.

2. We believe that this exemption will promote the public interest through the exchange of information and ideas between the Commission and the other principal agencies responsible for promoting or ensuring competition in the telecommunications industry. It should lead to more effective enforcement and protection of the public interest, development and application of more consistent analytical methodologies, an improved, expedited license transfer process, and the possible avoidance of unnecessarily duplicative efforts. At the same time, the requirement for disclosure of any factual information relied on by the Commission will protect the rights of the parties.

3. Because the amendment adopted herein relates to agency practice and procedure, notice and comment is not required. 5 U.S.C. §553(b)(A).

4. Accordingly, IT IS ORDERED, that Part 1 of the Rules and Regulations of the Federal Communications Commission ARE AMENDED in the manner indicated in the Appendix to this *Order*.

5. IT IS FURTHER ORDERED that these amendments to the Commission's Rules SHALL BECOME EFFECTIVE upon publication in the Federal Register. *See* 5 U.S.C. § 553(d).

6. Authority for this action is contained in Sections 4(i), 4(j), and 303(r) of the Communcations Act of 1934, as amended, 47 U.S.C.§§ 154(i), 154(j), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part I (Practice and Procedure) of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303: Implement 5 U.S.C. § 552 and § 21 U.S.C. 853a, unless otherwise noted.

2. Section 1.1204(b) is amended by adding paragraph (8) to read as follows:

§ 1.1204 General exemptions

* * * * *

(8) The presentation is to or from the United States Department of Justice or Federal Trade Commission and involves a telecommunications competition matter in a proceeding which has not been designated for hearing and in which the relevant agency (Department of Justice or Federal Trade Commission) is not a party; *provided that*, any new factual information obtained through such a presentation that is relied on by the Commission in its decision-making process will be disclosed by the Commission no later than at the time of issuance of the Commission's decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application of File No. CSR-4262T
D.D. CABLE PARTNERS, L.P.

For Waiver of Section 76.502 of the
Commission's Rules, 47 C.F.R. § 76.502

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 1994; Released: October 24, 1994

By the Chief, Cable Services Bureau:

1. On May 23, 1994, D.D. Cable Partners, L.P., ("D.D. Cable") filed a request for waiver of the Commission's anti-trafficking rule, 47 C.F.R. § 76.502 (a), in order to transfer ten cable system franchises in central Illinois to Green County Partners, Inc. ("Green County"), and to transfer eleven cable system franchises in central Illinois to Tele-Communications, Inc. ("TCI").[1] On July 27, 1994, D.D. Cable requested expedited consideration of the waiver request related to the proposed Green County transfers and indicated it has already obtained approvals from three franchise authorities.[2]

2. Section 76.502 of the Commission's Rules implements Section 617 of the Communications Act of 1934, as amended, (the "Act"), 47 U.S.C. § 537. Section 617(a) of the Act establishes a three-year holding requirement for cable systems and, with certain exceptions, restricts the ability of a cable operator to sell or otherwise transfer ownership in a cable system within a 36 month period following either the acquisition or initial construction of the system. 47 U.S.C. § 537(a). The anti-trafficking provision is intended to restrict profiteering transactions and other transfers that are likely to adversely affect cable rates or service in the local franchise area. *See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, First Report and Order*, 8 FCC Rcd 6828 at paras. 11, 21 and 36 (1993). The provision is not intended to inhibit investment in the cable industry or delay or disrupt legitimate cable transactions. *First Report and Order*, 8 FCC Rcd at paras. 11, 21 and 36. Thus, Section 617(d), in addition to directing that waivers shall be granted in cases of default, foreclosure or other financial distress, provides the Commission with broad general discretion to grant waivers on a case-by-case basis in the public interest where that would be consistent with the underlying objectives of the Act. *See* 47 U.S.C. § 537(d); *First Report and Order*, 8 FCC Rcd at para. 78.

3. Public interest waivers of the three-year holding period are considered on a case-by-case basis. *First Report and Order*, 8 FCC Rcd at para. 78.[3] In addition, a blanket anti-trafficking waiver exists for small systems serving 1,000 subscribers or less. *First Report and Order*, 8 FCC Rcd at para. 91. In adopting this waiver, the Commission noted that small systems serving rural areas with low population density are unlikely to be the subject of profiteering transactions.[4]

4. D.D. Cable states that it acquired the stock of Star Midwest, Inc., a financially distressed Wisconsin-based multiple system operator on June 30, 1992. Through that transaction, D.D. Cable acquired approximately 125,000 subscribers located in 227 franchises serving rural communities in Wisconsin, Illinois, Minnesota and Iowa. On February 4, 1994, the Commission granted D.D. Cable a waiver of the anti-trafficking rule to permit it to sell five of those cable systems serving 12 franchises and 5,012 subscribers in Illinois to TCI. *See D.D. Cable Partners, L.P.*, 9 FCC Rcd 590 (1994).

5. D.D. Cable now seeks additional waivers of the anti-trafficking rule in order to complete two separate transactions. First, D.D. Cable seeks to sell cable systems served by six headends serving ten franchises and 5,965 subscribers in Illinois to Green County.[5] Three of the six headends, Athens, Mason City and Riverton, serve less than 1,000 subscribers. The Petersburg headend serves 1,046 subscribers in two franchises, the Williamsville headend serves 1,054 subscribers in two franchises and the Carrollton headend serves 1,692 subscribers in three franchises. The franchise authorities for the three franchises served by the Carrollton headend, Carrollton, Roodhouse and Whitehall, have each approved the proposed transfer. *See* D.D. Cable's letter of July 27, 1994. According to D.D. Cable, transfer requests and the appropriate anti-trafficking certifications have been submitted to the remaining seven franchise authorities. D.D. Cable notes that the number of subscribers in each of the ten franchises ranges from 317 subscribers to 887 subscribers and of the three headends serving over 1,000 subscribers, none serves a franchise area with more than 735

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[1] D.D. Cable served copies of the waiver request on the franchise authorities on June 9, 1994. Public notice of the waiver request occurred on June 10, 1994. The waiver request is unopposed.

[2] By *Public Notice*, Report No. 3502, released July 20, 1994, Commission consent to the assignment of CARS license WHZ-924 at Whitehall, Illinois was granted.

[3] Responsibility for enforcement of the statutory anti-trafficking provision is shared with local franchise authorities that act on specific transfer or assignment requests. Local authorities are most familiar with individual cable operators and franchise agreements, and local authorities are better positioned to evaluate the effects of a proposed transfer on cable rates and service. *First Report and Order*, 8 FCC Rcd at para. 36. Thus, while the Commission may grant waivers of the three year holding requirement in appropriate cases, such waivers are conditioned upon the grant of transfer approval by the local franchise authorities; i.e., the waivers do not become effective unless local franchise authority approval is ultimately obtained and do not affect the discretion of local franchise authorities to decide transfer requests. *Id.* at para. 78.

[4] The waiver for small systems is also contingent upon and does not affect local franchise authority consideration of transfer requests, where such transfer approval is required. *First Report and Order*, 8 FCC Rcd at para. 90.

[5] According to D.D. Cable, Green County, whose corporate headquarters is in Springfield, Illinois, seeks to acquire the central Illinois cable systems in order to expand its business, which includes ownership of cable systems in Montana and consulting and contract construction of cable system upgrades.

subscribers.[6] The total number of subscribers involved in the proposed transfer to Green County represents less than 5% of the subscribers D.D. Cable acquired from Star Midwest in June of 1992.[7] D.D. Cable notes that Green County will operate all ten of the franchises out of one consolidated office in Springfield, Illinois. D.D. Cable also notes that none of the ten franchises can be operated economically on a stand-alone basis.[8]

6. Second, D.D. Cable seeks a waiver of the anti-trafficking rule in order to sell cable systems served by four headends serving eleven franchises and 7,629 subscribers in Illinois to TCI.[9] None of the cable systems involved in the proposed transfer to TCI is entitled to the small system blanket waiver. The Paxton headend serves 1,670 subscribers in three franchises, the Mahomet headend serves 2,557 subscribers in three franchises, and the two Momence headends serve 1,190 and 2,212 subscribers in two and three franchises, respectively. According to D.D. Cable, transfer requests and the appropriate anti-trafficking certifications have been submitted to all of the local franchise authorities where approval is required. D.D. Cable notes that the number of subscribers in each of the eleven franchises ranges from 101 subscribers to 1,888 subscribers, and that only three franchises have over 1,000 subscribers.[10] The total number of subscribers involved in this proposed transfer to TCI represents approximately 6% of the subscribers D.D. Cable acquired from Star Midwest in June of 1992.[11]

7. D.D. Cable asserts that as an affiliate of TCI, the proposed transaction does not implicate the profiteering concerns underlying the anti-trafficking rule. D.D. Cable notes that all eleven of the franchises are adjacent to existing TCI systems and will be consolidated with the adjacent TCI systems, thus creating operating efficiencies. Finally, D.D. Cable again notes that the franchises cannot be operated economically on a stand-alone basis and each of the headends is unprofitable.[12]

8. With respect to the proposed transfer to Green County, we will grant a waiver for the three systems serving less than 1,000 subscribers, pursuant to 47 C.F.R. § 502(g)(2). We note that two of the remaining three systems are barely over the 1,000 subscriber limit for the blanket waiver provision, and the local franchise authorities have approved the proposed transfer of the third system. Thus, based upon the totality of the evidence, we find that grant of the requested waiver to permit the transfer of the cable systems to Green County would be consistent with the public interest and our obligations pursuant to Section 617(d) of the Act.

9. With respect to the proposed transfer to TCI of additional cable systems serving over 1,000 subscribers, we note that D.D. Cable has not presented sufficient evidence to support its assertions that the proposed transfer to an indirect affiliate does not implicate profiteering and that operating efficiencies will result. Thus, we will withhold action on this second waiver request pending receipt of additional information establishing that the transfer of these systems within the three-year holding period is consistent with the public interest.

10. In view of the foregoing, IT IS ORDERED that, the request for waiver of 47 C.F.R. § 76.502(a) IS GRANTED with respect to the proposed transfer of cable systems from D.D. Cable Partners, L.P. to Green County Partners, Inc., and the request for waiverof 47 C.F.R. §76.502(a) is held in abeyance with respect to the proposed transfer of cable systems from D.D. Cable Partners, L.P. to Tele-Communications, Inc.

11. This action is taken by the Chief, Cable Service Bureau pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[6] According to D.D. Cable, the Carrollton headend serves Carrollton (520 subscribers), Roodhouse (525 subscribers) and Whitehall (647 subscribers); the Petersburg headend serves Petersburg (729 subscribers) and Menard County (317 subscribers); the Williamsville headend serves Williamsville (319 subscribers) and Sherman (735 subscribers); the Athens headend serves Athens (554 subscribers); the Mason City headend serves Mason City (732 subscribers); and the Riverton headend serves Riverton (887 subscribers).

[7] Combining the number of subscribers and franchises involved in the proposed transfer to Green County with the transfer of 5,012 subscribers and 12 franchises to TCI earlier this year and the proposed transfer of an additional 7,629 subscribers and 11 franchises to TCI, results in a total transfer of 18,606 subscribers and 33 franchises, which is still less than 15% of the 125,000 subscribers and 227 franchises D.D. Cable acquired from Star Midwest in June of 1992.

[8] While this may be true, we note that D.D. Cable has presented no evidence of the financial condition of the cable systems involved and does not appear to be asking for a financial distress based waiver.

[9] D.D. Cable represents that it is a 23.2% affiliate of TCI through TCI's 47.4% indirect limited partnership interest in Robin Media Group, Inc., which has a 49.4% interest in D.D. Cable.

[10] According to D.D. Cable, the Paxton headend serves Paxton (1,388 subscribers), Loda (120 subscribers) and Bayles Lake (162 subscribers); the Mahomet headend serves Mahomet (1,071 subscribers), Fisher (487 subscribers) and Champaign County (999 subscribers); the first Momence headend serves Momence (914 subscribers) and Kankakee (276 subscribers); and the second Momence headend serves Watseka (1,888 subscribers), Woodland (101 subscribers) and Crescent City (223 subscribers).

[11] Combining the number of subscribers and franchises involved in the proposed transfer to TCI with the transfer of 5,012 subscribers and 12 franchises to TCI earlier this year, the total transfer to TCI represents approximately 10% of the 125,000 subscribers and 227 franchises D.D. Cable acquired from Star Midwest in June of 1992.

[12] While this may be true, we note that D.D. Cable again has presented no evidence of the financial condition of the cable systems involved and does not appear to be asking for a financial distress based waiver.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Amateur Service Rules to Change Procedures for Filing an Amateur Service License Application and to Make Other Procedural Changes.

ORDER

Adopted: October 17, 1994; Released: October 24, 1994

By the Chief, Private Radio Bureau:

1. This *Order* amends the amateur service rules to provide an electronic filing capability to the volunteer-examiner coordinators (VECs),[1] to clarify that amateur station and operator licenses are authorized as soon as the license data is entered into the Commission's licensee data base, and to reflect other nonsubstantive procedural changes.

2. **Electronically-filed license applications**. Successful license examinees want their licenses granted as soon as possible so that they can operate their amateur stations. Recent modernization of the Commission's data processing capabilities makes it possible to greatly reduce the time it takes for us to grant licenses in the amateur service. By accepting from the VECs electronically filed data from applications for new and upgraded amateur operator licenses, the time and effort required for the VECs to send, and for the Commission to receive, application documents by mail would be eliminated.[2] All of the VECs have notified us that they want to begin electronic filing of license application data as soon as possible. As part of their routine operations, they enter the data from the application documents they receive into an electronic form that can be sent at high speed over telephone lines to our license processing facility. This data can be used as received so that our license processors could discontinue manually reentering the data into the processing system. We have been making arrangements with the VECs, therefore, to enable them to use electronic filing procedures similar to those that have been implemented for certain private land mobile radio services.[3] The application form,[4] moreover, has been revised to accommodate electronic filing. We are, accordingly, amending Section 97.519[5] to enable a VEC to forward electronically the data from the application documents for the examination sessions it coordinates.[6] VECs may also continue to send by mail to our license processing facility the application documents.

3. **License Grant**. The decision to grant a license occurs when our license processing facility enters the data into the amateur service licensee data base.[7] Currently, however, the new licensee must delay beginning operation until a license document can be printed, mailed, and delivered.[8] This procedure can result in several weeks delay during which the licensee cannot operate an amateur station. Fortunately, information technology is making our amateur service licensee data base more widely available, thus diminishing the need for an amateur operator to hold a license document before exercising the privileges authorized by the grant of the license.[9] We are amending the rules, therefore, to authorize operation on the basis of the licensee data appearing in the amateur service licensee data base.[10]

4. **Procedural changes**. Beginning in 1995,[11] our new system will give our license processing facility the capability to make a timely mailing to a licensee's address of record a renewal short form,[12] filled in and ready for signature. We are amending the rules, therefore, to allow this form to be so used. Because we cannot be certain of delivery of the form to every licensee in every instance, however, we will also continue to allow the longer forms[13] to be used for renewing licenses. We are also combining

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[1] There are eighteen VECs that coordinate the work of some 30,000 volunteer examiners (VEs) who prepare and administer examinations for new and upgraded amateur operator licenses. As part of this process, the VECs receive and screen the application forms from the VEs and forward them to the Commission. One of the VECs is prepared to submit the data on a computer diskette. The remainder want to use the telephone lines for this purpose.

[2] Under Section 3.16.4 of *Instructions For Volunteer Examiner Coordinators*, the VECs retain examination session records for fifteen months. Except for a brief period at the start of electronic filing during which the VECs will also submit the paper forms for verification of the data that is filed electronically, the VEC will retain the paper forms and make them available to the Commission upon request.

[3] *See Order* 8 FCC Rcd 2662 (1993).

[4] FCC Form 610, November 1993.

[5] 47 C.F.R. § 97.519.

[6] Paper applications from licensees that are filed directly with the Commission, such as license renewal and modification, will continue to be sent by mail until such time as electronic filing can be extended to these transactions.

[7] This data base resides in a magnetic storage media. It contains information such as the licensee's name, address, class of operator license, and station call sign. The information is used for regulatory functions such as verifying that a transmitting station has a license grant and for contacting the licensee quickly in case the station is causing interference.

[8] *See* Section 97.7 of the Commission's Rules, 47 C.F.R. § 97.7.

[9] The amateur service licensee data base is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161, (703) 487-4600 or 1-800-553-NTIS. It also is distributed by a number of suppliers in the private sector. The amateur service community makes the data base widely available through their electronic bulletin boards and packet radio systems. We intend, in the future, to make the current licensee data base publicly available through an accessible, on-line, read-only electronic system.

[10] *See* Section 97.9(a) of the Commission's Rules, 47 C.F.R. § 97.9(a). Requiring a license document to be in the personal possession of an amateur service licensee is not as necessary as in the past because we generally rely upon the licensee data base to confirm that the licensee is authorized to operate a station in the amateur service.

[11] The beginning date will be announced by public notice.

[12] FCC Form 610-R.

[13] FCC Form 610 is for use by persons. FCC Form 610-B is used by club, military recreation, and RACES stations.

into Section 97.509[14] all of the administering volunteer examiner (VE) requirements that arehpresently stated in four separate rule sections,[15] and adding new Section 97.511, *Examinee conduct*, to emphasize that an examinee must comply with the instructions given by the administering VEs. Further, we are amending Section 97.9[16] to treat Technician Plus as a license class. *Technician Plus* means that a Technician Class[17] licensee has also passed a telegraphy examination. We believe that showing this information in our licensee data base and license document as a separate class rather than continue to treat it as a category of the Technician Class is consistent with current licensing procedures.

5. We firmly believe in the principle that government should be responsive to user needs.[18] The rules that we are amending will enable us to use procedures that are responsive to requests from VEs, VECs, and applicants that the Commission reduce the time it takes to authorize new amateur service licensees to operate their stations. When these procedures are fully implemented, such authorizations will be made very quickly. These amendments have been made possible through modernization of the Commission's and the VECs' data processing capabilities.

6. Because the rule amendments adopted herein are nonsubstantive in nature, the notice and comment provisions of Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, need not be complied with. This action is taken under the authority delegated to the Chief, Private Radio Bureau, in Section 0.331(a)(1) of the Commission's Rules, 47 C.F.R. § 0.331(a)(1).

7. We certify that the Regulatory Flexibility Act of 1980 does not apply to the amended rules because there will not be any significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The amateur service may not be used to transmit communications for compensation, for the pecuniary benefit of the station control operator or the station control operator's employer, or for communications, on a regular basis, which could reasonably be furnished through other radio services. *See* 47 C.F.R. §97.113. The Secretary shall send a copy of this *Order*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981).

8. Accordingly, IT IS ORDERED that effective December 20, 1994, Part 97 of the Commission's Rules, 47 C.F.R. Part 97, IS AMENDED as set forth below.

9. For further information, contact William T. Cross, Personal Radio Branch, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Appendix

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 97 - Amateur Radio Service

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. Section 97.5 is amended by revising the entire text to read as follows:

§ 97.5 Station license required.

(a) The person having physical control of the station apparatus must have been granted a station license of the type listed in paragraph (b), or a hold an unexpired document of the type listed in paragraph (c), before the station may transmit on any amateur service frequency from any place that is:

(1) Within 50 km of the Earth's surface and at a place where the amateur service is regulated by the FCC;

(2) Within 50 km of the Earth's surface and aboard any vessel or craft that is documented or registered in the United States; or

(3) More than 50 km above the Earth's surface aboard any craft that is documented or registered in the United States.

(b) The types of station licenses are:

(1) An operator/primary station license. One, but only one, operator/primary station license is granted to each person who is qualified to be an amateur operator. The primary station license is granted together with the amateur operator license. Except for a representative of a foreign government, any person who qualifies by examination is eligible to apply for an operator/primary station license. The operator/primary station license document is printed on FCC Form 660.

[14] 47 C.F.R. § 97.509.

[15] *See* Sections 97.509, 97.511, 97.515, and 97.517 of the Commission's Rules, 47 C.F.R. §§ 97.509, 97.511, 97.515, and 97.517.

[16] 47 C.F.R. § 97.9.

[17] The requirements for a Technician Class operator license are written examinations only. *See* Section 97.501(d) of the Commission's Rules, 47 C.F.R. § 97.501(d).

[18] Vice President Al Gore, *Report of the National Performance Review, From Red Tape to Results: Creating a Government That Works Better and Costs Less*, at 6-8 (1993). The Vice President's Report stresses putting people first. Serving customers and cutting costs are two of its key principles. This *Order* embraces these principles by revising rules to speed the authorization of amateur service operation, and reducing the cost to the taxpayers of processing the licenses.

(2) A club station license. A club station license is granted only to the person who is the license trustee designated by an officer of the club. The trustee must be a person who has been granted an Amateur Extra, Advanced, General, Technician Plus, or Technician operator license. The club must be composed of at least two persons and must have a name, a document of organization, management, and a primary purpose devoted to amateur service activities consistent with this Part. The club station license document is printed on FCC Form 660.

(3) A military recreation station license. A military recreation station license is granted only to the person who is the license custodian designated by the official in charge of the United States military recreational premises where the station is situated. The person must not be a representative of a foreign government. The person need not have been granted an amateur operator license. The military recreation station license document is printed on FCC Form 660.

(4) A RACES station license. A RACES station license is granted only to the person who is the license custodian designated by the official responsible for the governmental agency served by that civil defense organization. The custodian must be the civil defense official responsible for coordination of all civil defense activities in the area concerned. The custodian must not be a representative of a foreign government. The custodian need not have been granted an amateur operator license. The RACES station license document is printed on FCC Form 660.

(c) The types of documents are:

(1) A *reciprocal permit for alien amateur licensee* (FCC Form 610-AL) issued to the person by the FCC.

(2) An amateur service license issued to the person by the Government of Canada. The person must be a Canadian citizen.

(d) A person who has been granted a station license of the type listed in paragraph (b), or who holds an unexpired document of the type listed in paragraph (c), is authorized to use in accordance with the FCC Rules all transmitting apparatus under the physical control of the station licensee at points where the amateur service is regulated by the FCC.

3. Section 97.7 is amended by revising the text to read as follows:

§ 97.7 Control operator required.

When transmitting, each amateur station must have a control operator. The control operator must be a person who has been granted an amateur operator/primary station license, or who holds an unexpired document of the following types:

(a) A *reciprocal permit for alien amateur licensee* (FCC Form 610-AL) issued to the person by the FCC, or

(b) An amateur service license issued to the person by the Government of Canada. The person must be a Canadian citizen.

4. Section 97.9 is amended by revising the text to read as follows:

§ 97.9 Operator license.

(a) The classes of amateur operator licenses are: Novice, Technician, Technician Plus (until such licenses expire, a Technician Class license granted before February 14, 1991, is considered a Technician Plus Class license), General, Advanced, and Amateur Extra. A person who has been granted an operator license is authorized to be the control operator of an amateur station with the privileges of the operator class specified on the license.

(b) A person who has been granted an operator license of Novice, Technician, Technician Plus, General, or Advanced class and who has properly submitted to the administering VEs an application document, FCC Form 610, for an operator license of a higher class, and who holds a CSCE indicating that the person has completed the necessary examinations within the previous 365 days, is authorized to exercise the rights and privileges of the higher operator class until final disposition of the application or until 365 days following the passing of the examination, whichever comes first.

5. Section 97.17 is revised in its entirety to read as follows:

§ 97.17 Application for new license or *reciprocal permit for alien amateur licensee.*

(a) Any qualified person is eligible to apply for an amateur service license.

(b) Each application for a new amateur service license must be made on the proper document:

(1) FCC Form 610 for a new operator/primary station license;

(2) FCC Form 610-A for a *reciprocal permit for alien amateur licensee;* and

(3) FCC Form 610-B for a new amateur service club or military recreation station license.

(c) Each application for a new operator/primary station license must be submitted to the VEs administering the qualifying examination.

(d) Any eligible person may apply for a *reciprocal permit for alien amateur license* e. The application document, FCC Form 610-A, must be submitted to the FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245.

(1) The person must be a citizen of a country with which the United States has arrangements to grant reciprocal operating permits to visiting alien amateur operators is eligible to apply for a *reciprocal permit for alien amateur licensee.*

(2) The person must be a citizen of the same country that issued the amateur service license.

(3) No person who is a citizen of the United States, regardless of any other citizenship also held, is eligible for a *reciprocal permit for alien amateur licensee.*

(4) No person who has been granted an amateur operator license is eligible for a *reciprocal permit for alien amateur licensee.*

(e) No person shall obtain or attempt to obtain, or assist another person to obtain or attempt to obtain, an amateur service license or *reciprocal permit for alien amateur licensee* by fraudulent means.

(f) One unique call sign will be shown on the license of each new primary station. The call sign will be selected by the sequential call sign system.

(g) No new license for a club, military recreation, or RACES station will be granted.

6. The text of Section 97.19 is deleted and marked [Reserved].

7. Section 97.21 is amended in its entirety to read as follows:

§ 97.21 Application for a modified or renewed license.

(a) A person who has been granted an amateur station license that has not expired:

(1) Must apply for a modification of the license as necessary to show the correct mailing address, licensee name, club name, license trustee name, or license custodian name. The application document must be submitted to: FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. For an operator/primary station license, the application must be made on FCC Form 610. For a club, military recreation, or RACES station license, the application must be made on FCC Form 610-B.

(2) May apply for a modification of the license to show a higher operator class. The application must be made on FCC Form 610 and must be submitted to the VEs administering the qualifying examination.

(3) May apply for renewal of the license for another term. (The FCC may mail to the licensee a FCC Form 610-R that may be used for this purpose.) The application may be made on the FCC Form 610-R if it is received from the FCC. If the Form 610-R is not received from the FCC at least 30 days before the expiration of the license, for an operator/primary station license, the application may be made on FCC Form 610. For a club, military recreation, or RACES station license, the application may be made on FCC Form 610-B. The application must be submitted no more than 90 days before its expiration to: FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. When the application for renewal of the license has been received by the FCC at 1270 Fairfield Road, Gettysburg, PA 17325-7245 prior to the license expiration date, the license operating authority is continued until the final disposition of the application.

(4) May apply for a modification of the license to show a different call sign selected by the sequential call sign system. The application document must be submitted to: FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. The application must be made on FCC Form 610. This modification is not available to club, military recreation, or RACES stations.

(b) A person who had been granted an amateur station license, but the license has expired, may apply for renewal of the license for another term during a 2 year filing grace period. The application document must be received by the FCC at 1270 Fairfield Road, Gettysburg, PA 17325-7245 prior to the end of the grace period. For an operator/primary station license, the application must be made on FCC Form 610. For a club, military recreation, or RACES station license, the application must be made on FCC Form 610-B. Unless and until the license is renewed, no privileges in this Part are conferred.

(c) Each application for a modified or renewed amateur service license must be accompanied by a photocopy (or the original) of the license document unless an application for renewal using FCC Form 610-R is being made, or unless the original document has been lost, mutilated or destroyed.

(d) Unless the holder of a station license requests a change in call sign, the same call sign will be assigned to the station upon renewal or modification of a station license.

(e) A *reciprocal permit for alien amateur licensee* cannot be renewed. A new *reciprocal permit for alien amateur licensee* may be issued upon proper application.

8. Section 97.23 is amended in its entirety to read as follows:

§ 97.23 Mailing address.

(a) Each application for a license and each application for a *reciprocal permit for alien amateur licensee* must show a mailing address in an area where the amateur service is regulated by the FCC and where the licensee or permittee can receive mail delivery by the United States Postal Service. Each application for a *reciprocal permit for alien amateur licensee* must also show the permittee's mailing address in the country of citizenship.

(b) When there is a change in the mailing address for a person who has been granted an amateur operator/primary station license, the person must file a timely application for a modification of the license. Revocation of the station license or suspension of the operator license may result when correspondence from the FCC is returned as undeliverable because the person failed to provide the correct mailing address.

(c) When a person who has been granted a *reciprocal permit for alien amateur licensee* changes the mailing address where he or she can receive mail delivery by the United States Postal Service, the person must file an application for a new permit. Cancellation of the *reciprocal permit for alien amateur licensee* may result when correspondence from the FCC is returned as undeliverable because the permittee failed to provide the correct mailing address.

9. Section 97.25 is amended in its entirety to read as follows:

§ 97.25 License term.

(a) An amateur service license is normally granted for a 10-year term.

(b) A *reciprocal permit for alien amateur licensee* is normally granted for a 1-year term.

10. In Section 97.27 is amended in its entirety to read as follows:

§ 97.27 FCC modification of station license.

(a) The FCC may modify a station license, either for a limited time or for the duration of the term thereof, if it determines:

(1) That such action will promote the public interest, convenience, and necessity; or

(2) That such action will promote fuller compliance with the provisions of the Communications Act of 1934, as amended, or of any treaty ratified by the United States.

(b) When the FCC makes such a determination, it will issue an order of modification. The order will not become final until the licensee is notified in writing of the proposed action and the grounds and reasons therefor. The licensee will be given reasonable opportunity of no less than 30 days to protest the modification; except that, where safety of life or property is involved, a shorter period of notice may be provided. Any protest by a licensee of an FCC order of modification will be handled in accordance with the provisions of 47 U.S.C. § 316.

11. Section 97.29 is added to read as follows:

§ 97.29 Replacement license document.

Each person who has been granted an amateur station license or *reciprocal permit for alien amateur licensee* whose original license document or permit document is lost, mutilated or destroyed must request a replacement. The request must be made to: FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. A statement of how the document was lost, mutilated, or destroyed must be attached to the request. A replacement document must bear the same expiration date as the document that it replaces.

12. In Section 97.301, paragraphs (a) through (g) are amended to read as follows:

§ 97.301 Authorized frequency bands.

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(a) For a station having a control operator who has been granted an operator license of Technician, Technician Plus, General, Advanced, or Amateur Extra Class:

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(b) For a station having a control operator who has been granted an operator license of Amateur Extra Class:

***

(c) For a station having a control operator who has been granted an operator license of Advanced Class:

***

(d) For a station having a control operator who has been granted an operator license of General Class;

***

(e) For a station having a control operator who has been granted an operator license of Novice or Technician Plus Class:

***

(f) For a station having a control operator who has been granted an operator license of Novice Class:

***

13. Section 97.501 is amended by revising the introductory paragraph, paragraphs (d) and (e), and by adding new paragraph (d) to read as follows:

§ 97.501 Qualifying for an amateur operator license.

Each applicant for the grant of a new amateur operator license or for the grant of a modified license to show a higher operator class, must pass or otherwise receive credit for the examination elements specified for the class of operator license sought:

(a) ***

(b) ***

(c) ***

(d) Technician Plus Class operator: Elements 1(A) or 1(B) or 1(C), 2, and 3(A).

(e) Technician Class operator: Elements 2 and 3(A).

(f) Novice Class operator: Elements 1(A) or 1(B) or 1(C), and 2.

14. Section 97.505, the entire text is amended to read as follows:

§ 97.505 Element credit.

(a) The administering VEs must give credit as specified below to an examinee holding any of the following documents:

(1) An unexpired (or expired but within the grace period for renewal) FCC-granted Advanced Class operator license document : Elements 1(B), 2, 3(A), 3(B), and 4(A).

(2) An unexpired (or expired but within the grace period for renewal) FCC-granted General Class operator license document : Elements 1(B), 2, 3(A), and 3(B).

(3) An unexpired (or expired but within the grace period for renewal) FCC-granted Technician Plus Class operator (including a Technician Class operator license granted before February 14, 1991) license document: Elements 1(A), 2, and 3(A).

(4) An unexpired (or expired but within the grace period for renewal) FCC-granted Technician Class operator license document: Elements 2 and 3(A).

(5) An unexpired (or expired but within the grace period for renewal) FCC-granted Novice Class operator license document: Elements 1(A) and 2.

(6) A CSCE: Each element the CSCE indicates the examinee passed within the previous 365 days.

(7) An unexpired (or expired for less than 5 years) FCC-issued commercial radiotelegraph operator license document or permit: Element 1(C).

(8) An expired or unexpired FCC-issued Technician Class operator license document granted before March 21 1987: Element 3(B).

(9) An expired or unexpired FCC-issued Technician Class license document granted before February 14, 1991: Element 1(A).

(10) An unexpired (or expired but within the grace period for renewal), FCC-granted Novice, Technician Plus (including a Technician Class operator license granted before February 14, 1991), General, or Advanced Class operator license document, and a FCC Form 610 containing:

(i) A physician's certification stating that because the person is an individual with a severe handicap, the duration of which will extend for more than 365 days beyond the date of the certification, the person is unable to pass a 13 or 20 words per minute telegraphy examination; and

(ii) A release signed by the person permitting the disclosure to the FCC of medical information pertaining to the person's handicap: Element 1(C).

(b) No examination credit, except as herein provided, shall be allowed on the basis of holding or having held any other license grant or document.

15. Section 97.507 is amended by revising paragraph (a) to read as follows:

§ 97.507 Preparing an examination.

(a) Each telegraphy message and each written question set administered to an examinee must be prepared by a VE who has been granted an Amateur Extra Class operator license. A telegraphy message or written question set, however, may also be prepared for the following elements by a VE who has been granted an FCC operator license of the class indicated:

(1) ***

(2) ***

(3) Element 2: Advanced, General, Technician, or Technician Plus Class operator.

* * * * *

16. Section 97.509 is amended by revising the text to read as follows:

§ 97.509 Administering VE requirements.

(a) Each examination for an amateur operator license must be administered by 3 administering VEs at an examination session coordinated by a VEC. Before the session, the administering VEs must make a public announcement stating the location and time of the session. The number of examinees at the session may be limited.

(b) Each administering VE must:

(1) Be accredited by the coordinating VEC;

(2) Be at least 18 years of age;

(3) Be a person who has been granted an FCC amateur operator license document of the class specified below:

(i) Amateur Extra, Advanced, or General Class in order to administer a Novice, Technician, or Technician Plus Class operator license examination;

(ii) Amateur Extra Class in order to administer a General, Advanced, or Amateur Extra Class operator license examination.

(4) Not be a person whose grant of an amateur station license or amateur operator license has ever been revoked or suspended.

(5) Not own a significant interest in, or be an employee of, any company or other entity that is engaged in the manufacture or distribution of equipment used in connection with amateur station transmissions, or in the preparation or distribution of any publication used in preparation for obtaining amateur operator licenses. (An employee who does not normally communicate with that part of an entity engaged in the manufacture or distribution of such equipment, or in the preparation or distribution of any publication used in preparation for obtaining amateur operator licenses, may be an administering VE.)

(c) Each administering VE must be present and observing the examinee throughout the entire examination. The administering VEs are responsible for the proper conduct and necessary supervision of each examination. The administering VEs must immediately terminate the examination upon failure of the examinee to comply with their instructions.

(d) No VE may administer an examination to his or her spouse, children, grandchildren, stepchildren, parents, grandparents, stepparents, brothers, sisters, stepbrothers, stepsisters, aunts, uncles, nieces, nephews, and in-laws.

(e) No VE may administer or certify any examination by fraudulent means or for monetary or other consideration including reimbursement in any amount in excess of that permitted. Violation of this provision may result in the revocation of the grant of the VE's amateur station license and the suspension of the grant of the VE's amateur operator license.

(f) No examination that has been compromised shall be administered to any examinee. Neither the same telegraphy message nor the same question set may be re-administered to the same examinee.

(g) Passing a telegraphy receiving examination is adequate proof of an examinee's ability to both send and receive telegraphy. The administering VEs, however, may also include a sending segment in a telegraphy examination.

(h) Upon completion of each examination element, the administering VEs must immediately grade the examinee's answers. The administering VEs are responsible for determining the correctness of the examinee's answers.

(i) When the examinee is credited for all examination elements required for the operator license sought, the administering VEs must certify on the examinee's application document that the applicant is qualified for the license.

(j) When the examinee does not score a passing grade on an examination element, the administering VEs must return the application document to the examinee and inform the examinee of the grade.

(k) The administering VEs must accommodate an examinee whose physical disabilities require a special examination procedure. The administering VEs may require a physician's certification indicating the nature of the disability before determining which, if any, special procedures must be used.

(l) The administering VEs must issue a CSCE to an examinee who scores a passing grade on an examination element.

(m) Within 10 days of the administration of a successful examination for an amateur operator license, the administering VEs must submit the application document to the coordinating VEC.

17. Section 97.511 is amended by revising the heading and text to read as follows:

§ 97.511 Examinee conduct.

Each examinee must comply with the instructions given by the administering VEs.

18. Section 97.515 is deleted and reserved.

§ 97.515 [Reserved]

19. Section 97.517 is deleted and reserved.

§ 97.517 [Reserved]

20. Section 97.519 is amended by revising paragraph (b) and adding a new paragraph (d) to read as follows:

§ 97.519 Coordinating examination sessions.

(a) ***

(b) At the completion of each examination session, the coordinating VEC must collect the FCC Forms 610 documents and test results from the administering VEs. Within 10 days of collecting the FCC Forms 610 documents, the coordinating VEC must screen and, for qualified examinees, forward electronically or on diskette the data contained on the FCC Forms 610 documents, or forward the FCC Form 610 documents, to: FCC, 1270 Fairfield Road, Gettysburg, PA 17325-7245. When the data is forwarded electronically, the coordinating VEC must retain the FCC Forms 610 documents for at least fifteen months and make them available to the FCC upon request.

(c) ***

(d) The FCC may:

(1) Administer any examination element itself;

(2) Readminister any examination element previously administered by VEs, either itself or under the supervision of a VEC or VEs designated by the FCC; or

(3) Cancel the operator/primary station license of any licensee who fails to appear for readministration of an examination when directed by the FCC, or who does not successfully complete any required element that is readministered. In an instance of such cancellation, the person will be granted an operator/primary station license consistent with completed examination elements that have not been invalidated by not appearing for, or by failing, the examination upon readministration.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

COMCAST CORPORATION File No. MSD-93-14

For Declaratory Ruling Concerning
Section 310(b)(4) of the Communications
Act of 1934, as amended

MEMORANDUM OPINION AND ORDER

Adopted: October 11, 1994; Released: October 24, 1994

By the Chief, Mobile Services Division:

1. On February 26, 1993, Comcast Cellular Corporation (CCC) and Comcast Cellular Communications, Inc. (CCCI) filed a Petition for Declaratory Ruling that John R. Alchin, a citizen of Australia, may serve as Senior Vice President and Treasurer of CCC and CCCI. On February 18, 1994, Comcast Corporation (Comcast) supplemented the Petition for Declaratory Ruling filed by CCC and CCCI requesting that Mr. Alchin be permitted to serve as an officer of any subsidiary of Comcast that directly or indirectly controls common carrier licenses but is not itself a common carrier licensee. We find that Mr. Alchin's appointment as Senior Vice President and Treasurer is consistent with the public interest and we accordingly grant the petition for declaratory ruling as supplemented. The request for declaratory ruling was placed on public notice on March 15, 1993. *See Public Notice*, MSD-93-14 (released Mar. 15, 1993). No comments were filed in response to the public notice.

2. Under Section 310(b)(4) of the Act, a station license may not be held by:

> any corporation directly or indirectly controlled by any other corporation of which any officer . . . [is an] alien . . . if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. § 310(b)(4).

3. By its express language, the benchmarks established in Section 310(b)(4) apply to entities such as CCC and CCCI which directly or indirectly control licensees. The restrictions in Section 310(b)(4) reflect national security concerns and are designed to guard against foreign influence by limiting aliens' participation in certain domestic radio activities. *See Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4)*, 103 FCC 2d 511 (1985), *reconsidered in part*, 1 FCC Rcd 12 (1986) (*Wilner & Scheiner*). Nevertheless, the statute permits licensing of a corporation controlled by another corporation which employs an alien officer where it is not contrary to the public interest. *See Continental Illinois Venture Corp.*, 6 FCC Rcd 1944 (Mobile Serv. Div. 1991). In previous cases, the Commission has found that the public interest would not be adversely served where the alien officer had no control or supervision of licensee corporations. *See Xerox Corporation*, 74 FCC 2d 471 (1979); *International Telephone and Telegraph Corp.*, 67 FCC 2d 604 (1978).

4. We have previously found that Mr. Alchin may serve as Senior Vice President and Treasurer of Comcast, despite the fact that American Cellular Network Corp. (Amcell), a wholly owned subsidiary of Comcast, is a cellular licensee. *See Comcast Corporation*, 7 FCC Rcd 895 (Mobile Serv. Div. 1992). Because of corporate reorganization, Comcast now holds all of the common stock of CCC. CCC, in turn, holds all of the common stock of CCCI, which holds all of the issued and outstanding stock of Amcell. CCCI also holds a controlling interest in the stock of AWACS, Inc., the licensee of the nonwireline cellular system in the Philadelphia Metropolitan Statistical Area. Therefore, neither CCC nor CCCI hold any cellular licenses, but instead control entities which hold licenses.

5. We find the instant situation comparable to the situation which we previously approved. In *Comcast Corporation, supra*, we found it in the public interest to allow Mr. Alchin to serve as the Senior Vice President and Treasurer of a company which did not hold licenses but controlled a company which did. Comcast continues to purport that Mr. Alchin will not exercise supervision or control over the operation of the licensed facilities of either Amcell or AWACS. Accordingly, in view of Comcast's representations that Mr. Alchin will have no control or oversight of CCC and CCCI, or any other Comcast non-licensee subsidiary that directly or indirectly controls common carrier licenses, we do not find that Mr. Alchin's participation in CCC, CCCI, or another Comcast non-licensee subsidiary would be inconsistent with the Communications Act or the public interest.

6. Accordingly, IT IS ORDERED that the request for declaratory ruling as supplemented IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Golden Empire Broadcasting Company — File No. BRCT-93-0802KJ

For Renewal of License for
Station KHSL-TV
Chico, California

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1994; Released: October 12, 1994

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) a license renewal application for KHSL-TV in Chico, California; (ii) a Petition to Deny timely filed on November 1, 1993, by the California State Conference of Branches of National Association for the Advancement of Colored People ("NAACP") and the League of United Latin American Citizens, through its California State Board of Directors ("LULAC");[1] (iii) an opposition from the licensee; and (iv) the licensee's response to a staff letter of inquiry.

II. BACKGROUND

2. The NAACP and LULAC allege that KHSL-TV violated our Equal Employment Opportunity (EEO) Rule and policies. Accordingly, it requests that we conduct an investigation of the station's employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*) and designate the renewal application for hearing. The licensee charges that the NAACP and LULAC have not presented any evidence of discrimination, that the records indicate compliance with the Commission's EEO Rule, and that unconditional renewal is warranted.

III. PLEADINGS

3. Standing. In challenging an application pursuant to Section 309(d) of the Communications Act of 1934, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit, "specific allegations of fact sufficient to show ... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. § 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with knowledge of the facts alleged. 47 U.S.C. § 309(d)(1).

4. Submitted with the petition were statements under penalty of perjury from Reverend Edward V. Melfort, President, Bette's County chapter of the NAACP, and Monica Garcia, a LULAC member and LULAC Monterrey Council scholarship recipient. Both declarants' state that they are regular viewers of KHSL-TV and would be seriously aggrieved if the petition is not granted. We find that the above declarations meet our requirements for standing. Accordingly, we hold that the NAACP and LULAC have petitioner status against station KHSL-TV. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987); *see also Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89 (1980) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

IV. DISCUSSION

5. *Prima Facie Case*. The NAACP/LULAC derive their factual allegations from the licensee's EEO program and annual employment reports. Review of their allegations led us initially to conclude that the NAACP/LULAC presented a *prima facie* case demonstrating that unconditional grant of the renewal application would have been inconsistent with the public interest. *See* Section 309(d)(1) of the Communications Act of 1934, 47 U.S.C. § 309(d)(1); *Astroline, supra*.[2] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual, supra*.

6. Review of NAACP and LULAC's EEO allegations as well as the licensee's renewal application, opposition and inquiry response now lead us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that the licensee engaged in discrimination. Thus, grant of the application will serve the public interest. 47 U.S.C. §309(d)(2). *Astroline, supra*. However, we will grant renewal, with appropriate remedies.

7. Section 73.2080 of the Commission's rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ, and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and 73.2080(c).

8. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it

[1] The NAACP/LULAC also challenged the renewal applications of several other California television broadcast licensees. These stations' renewal applications will be reviewed in separate Commission orders.

[2] The licensee was not challenged regarding its recruitment of women. Nonetheless, as is our practice in all cases, we reviewed the licensee's EEO efforts in this respect and found them to be sufficient.

fails to evidence a record of adequate EEO efforts the Commission may impose a variety of remedies or sanctions, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rule Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987)(*Broadcast EEO); see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra.*

9. Review of the licensee's renewal application, inquiry response and opposition reveals 17 full-time hires, including 16 upper-level hires, during the period July 1, 1990, through November 1, 1993.[3] According to its renewal application, KHSL-TV received eight minority referrals from four general sources, no minority referrals from four minority specific sources and one minority referral from four female sources. In its inquiry response, licensee's records indicate that it recruited for all 17 full-time positions. It appears that KHSL-TV contacted the following general and minority recruitment sources for all 17[4] full-time positions during the period under review: *Enterprise Record, Record Searchlight*, California State University, Butte College, Butte County NAACP, California Indian Manpower Consortium, EDD job service, Veterans Service Office, National Organization for Women, Stinson & Isom Associates (an employee placement service), American Women in Radio and Television, Women in Communications, MECHA[5] , *Media Line*, California Job Bank, internal company posting, and four local television stations. The licensee also contacted the Hispanic Resource Council (for 13 positions) and the Acme Employment Agency (for one position). KHSL-TV received minority applicants as follows: *Media Line* (21 Asian/Pacific Islander applicants, seven Hispanic applicants, six Black applicants including one successful Black applicant), unsolicited applicants (nine Asian/Pacific Islander applicants, three Black applicants and six Hispanic applicants), former employees (one successful Black applicant), KTVU-TV (five Asian/Pacific Islander applicants), American Women in Radio and Television (one Asian applicant), California Job Bank (two Black applicants), MECHA (three Hispanic applicants), Acme Employment Agency (one American Indian applicant), Employment Agency (one Black applicant), the *Enterprise Record* (three Black applicants and one Hispanic applicant), employee referrals (one Black applicant) and KRCR-TV (one Black applicant).

10. The licensee received 72 minorities (18 Blacks, 17 Hispanics, 36 Asian/Pacific Islanders and one American Indian) among 344 applicants overall, including 71 minorities (18 Blacks, 17 Hispanics and 36 Asian/Pacific Islanders) among 341 applicants for upper-level positions. A total of 13 applicant pools, of which 12 were upper-level, included minorities. Review of the licensee's interview records reveals that it interviewed 198 applicants overall and 195 applicants for upper-level jobs. During the inquiry period, only one job, the receptionist/ clerical position, was not upper-level and the licensee interviewed one minority for the position (American Indian). The licensee interviewed minorities for upper-level positions as follows, 30 Asian/Pacific Islanders, 12 Blacks, and 10 Hispanics. Minorities were included in 13 interview pools and 12 upper-level interview pools. Two Blacks were hired for two upper-level positions.

11. The NAACP/LULAC state that KHSL-TV's statistical record is stagnant. They indicate, "twenty-three minority applicants sought employment in the twelve months preceding the filing of the 1993 renewal application, yet only one of eight hires was a minority." Additionally, the NAACP/LULAC assert that KHSL-TV increased the number of full-time employees by 14 (from 39 to 53) during the license term. They argue that KHSL-TV had 14 more opportunities to hire full-time minority employees during the license term.

12. In an amended renewal application filed with its opposition, KHSL-TV stated that one of its nine new employees hired during the renewal year was a minority.[6] The licensee asserts that this hire represents 11% of KHSL-TV's openings during the renewal year and, therefore, KHSL-TV is virtually at 100% parity based upon the total minority labor force in Chico using the 1990 census figures (11.6%). Lastly, the licensee indicates that its full-time staff grew only from 49 to 53, not 39 to 53 (as stated by the NAACP/LULAC) during the license term.

13. In its opposition, KHSL-TV also indicated that the NAACP has never referred an applicant to the station, even though it consistently sends vacancy notices to the NAACP. The licensee adds that it is unaware of LULAC's presence in the Chico area. KHSL-TV claims it attracted a large number of minority applicants, "far in excess of their representation in the Chico labor force," according to the 1980 census figures.[7]

14. Our review raises no substantial and material questions of fact warranting designation for hearing. *Astroline, supra.* In this regard, we find no indication of employment

[3] The current license term ended on December 1, 1993. The Chico, CA, Metropolitan Statistical Area (MSA), in which the station is located, has a 45.7% female and 11.6% minority labor force (0.9% Black, 7.6% Hispanic, 1.7% Asian/Pacific Islander, 1.4% American Indian). In the 1989 Annual Employment Report, two Hispanics (4.0%) are listed among 49 full-time employees and two Hispanics (4.4%) are among 45 upper-level employees. In the 1990 report, three Hispanics (5.9%) are listed among 51 full-time employees and two Hispanics (4.3%) are among 46 upper-level employees. The 1991 report lists two Hispanics (3.8%) among 53 full-time employees and two Hispanics (4.2%) among 48 upper-level employees. In the 1992 report, one Black (1.9%) and one Hispanic (1.9%) are listed among 53 full-time employees and one Black (2.0%) and one Hispanic (2.0%) are among 49 upper-level employees. The 1993 report lists one Black (1.9%) and one Hispanic (1.9%) among 53 full-time employees and one Black (2.2%) and one Hispanic (2.2%) among 45 upper-level employees.

[4] The licensee filled 17 full-time positions; however, it used the same applicant pool twice when it hired two engineers in February of 1993 and used another applicant pool twice in April and July of 1993, for two production positions.

[5] MECHA is a Hispanic organization consisting of students working towards various degrees at Butte College.

[6] KHSL-TV states that it discovered errors in its renewal application while preparing its opposition. Therefore, it filed an amended Form 396 which indicates that it hired one minority for one of nine positions, instead of one minority for one of eight positions.

[7] Using 1980 census statistics, the Chico MSA included 42.2% females and 8.5% minorities (4.9% Hispanic, 1.0% Black, 1.1% Asian/Pacific Islander and 1.5% American Indian). KHSL-TV

discrimination because the licensee attracted, interviewed, and hired minorities during its tenure. Under these circumstances, grant of renewal is appropriate.

15. During the inquiry period, the licensee recruited using minority sources for all 17 of its openings, obtained 72 minority applicants and 52 minority interviewees (of which 51 were for upper-level positions) and hired two minorities (all Blacks). The foregoing indicates that KHSL-TV consistently recruited, interviewed and hired minorities. Nevertheless, we are concerned about the licensee's efforts regarding Hispanics, the dominant minority in the Metropolitan Statistical Area. The licensee attracted only 17 Hispanics of 344 applicants, 10 Hispanics of 198 interviewees and failed to hire a single Hispanic for 17 vacancies during the inquiry period. Hence, KHSL-TV's assessment appears deficient because it failed to modify its recruitment efforts to attract qualified Hispanic applicants. Accordingly, in order to monitor the licensee's efforts in this regard, we will renew the license subject to reporting conditions.

V. CONCLUSION

16. Upon review of the record, we find that grant of the renewal application is in the public interest. However, we will grant the renewal application of KHSL-TV subject to reporting conditions.

VI. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that the Petition to Deny filed by the California State Conference of Branches of the NAACP and LULAC, through its California State Board of Directors, against the renewal application of KHSL-TV IS DENIED.

18. IT IS FURTHER ORDERED that the license renewal application filed by Golden Empire Broadcasting Company for Station KHSL-TV IS GRANTED subject to the EEO reporting conditions specified herein.[8]

19. IT IS FURTHER ORDERED that the licensee of Station KHSL-TV, submit to the Commission an original and one copy of the following information on August 1, 1995, and August 1, 1996:

(a) For each report, please make two lists divided by full-time and part-time job vacancies during the twelve months preceding the respective reporting dates, indicating the job title, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted:[9]

(b)A list of all employees as of the July 1, 1995, payroll period for the first report and as of the July 1, 1996, payroll period for the second report, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

20. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

21. The reports are to be filed with the Acting Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch at 202-632-7069.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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opposes Commission use of 1990 census data to analyze its efforts before such data becomes "publicly available." The Commission announced in advance that we would begin using 1990 labor force statistics for license renewal applications due to be filed after May 31, 1993 and for 1993 Annual Employment Reports. *See* Public Notice dated April 12, 1993. We apply 1980 census data to the 1989-1992 Annual Employment Reports. We apply 1990 census data to the 1993 Annual Employment Report.

[8] In view of the pending assignment application for KHSL-TV, we note that upon grant of that application, reporting conditions will follow the license as a matter of law and pass automatically to the assignee. *See San Luis Obispo Limited Partnership*, 9 FCC Rcd 894 (1994); *Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989).

[9] Such a list might start:

(1) News Director: Officials and Managers: Full-time.

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League and NAACP.

Selected: Black male (8/19/94).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

William D. White

against

Stations WPXI(TV), WQED(TV),
WQEX(TV), and WDUQ(FM)
Pittsburgh, Pennsylvania

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 1994; Released: October 17, 1994

By the Chief, Mass Media Bureau:

1. The Bureau has before it the following pleadings by William D. White ("White"): (i) a March 16, 1993, Petition for Reconsideration of our denial of complaints against stations WPXI(TV) and WDUQ(FM), Pittsburgh, Pennsylvania ("Petition I");[1] (ii) a March 29, 1994, Petition for Reconsideration of our denial of complaints against stations WQED(TV) and WQEX(TV), Pittsburgh, Pennsylvania ("Petition II");[2] and (iii) a February 14, 1994, informal objection against the license renewal application for station WPXI(TV), Pittsburgh, Pennsylvania.[3]

BACKGROUND

2. White asserts that he was a legally qualified candidate for the United States Senate from Pennsylvania in the 1991, 1992, and 1994 elections. He filed complaints against all the above-captioned stations alleging improper denial of equal opportunities and reasonable access. In addition, he alleged that noncommercial stations WQED(TV) and WQEX(TV) had opposed his candidacy in violation of the Communications Act.[4] White also complained that WPXI(TV) made an endorsement of two candidates in the 1991 Senate race during a program featuring these two candidates. The Division denied all of these complaints on the grounds that White had not demonstrated that he was a legally qualified candidate in any of the races under our rules. *See* 47 C.F.R. Section 73.1940.[5]

3. White also alleged an improper relationship between Milton Gross, Chief of the Bureau's Political Branch, and Richard Wycoff, President of the Pennsylvania Association of Broadcasters. White further claimed that Gross was rude to White during a telephone conversation.[6]

4. White filed two Petitions for Reconsideration of the denial of his complaints. In Petition I, concerning WPXI, White cites Sections 4(j), 4(l), 208, and 404 of the Communications Act[7] and alleges that these sections were not followed in his case. White reiterates his allegations concerning Gross and Wycoff, and also calls into question the conduct of Charles W. Kelley, the Chief of the Mass Media Bureau's Enforcement Division and the signatory of the Division's decision, for failing to "investigate" this matter and issue a written report. In Petition I, White also alleges, for the first time, that noncommercial station WDUQ(FM) violated Section 399 of the Act by opposing his candidacy.[8] In Petition II, concerning WQED and WQEX, White argues that the Commission exceeded its authority in that it employed a definition of a legally qualified candidate different from that used by the Federal Election Commission (FEC).

5. In his third pleading, White filed an informal objection against the license renewal application of WPXI contending that WPXI failed to afford sufficient news coverage to his campaigns and that it broadcast incorrect information concerning him in its newscast. White also alleges that WPXI has "various co-operative agreements" with other broadcast stations and a joint venture with a local cable provider, through which the station is attempting to "dominate or monopolize local news production."

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[1] Although Petition I was styled as a letter, it was in effect a Petition for Reconsideration. We deferred action on Petition I because White had filed a petition for review of our denial of his complaints. *See White v. FCC*, No.93-1419 (D.C. Cir. filed June 30, 1993). The Court dismissed the petition for review on October 27, 1993, because White had sought review of a staff order. *See* 47 U.S.C. Section 155(c)(7). White subsequently petitioned the Court for rehearing on November 15, 1993. The Court denied rehearing and stated that White was free to seek appropriate relief if the Commission failed to act on his pending request for reconsideration within a reasonable amount of time. *See* No. 93-1419 (D.C. Cir. Jan. 10, 1994) (order denying rehearing).

[2] In a March 21, 1994, denial of White's complaint against stations WQED(TV) and WQEX(TV), we stated that we were disposing of White's allegations only with respect to the 1994 elections. We deferred allegations that WQED(TV) and WQEX(TV) violated Sections 312(a)(7) and 399 of the Communications Act during the 1991 and 1992 elections for resolution with Petition I, which had been filed before our March 21, 1994, letter and dealt with similar allegations.

[3] Although not styled as such, this document was, in effect, an informal objection.

[4] Section 399 of the Communications Act provides that no noncommercial educational broadcasting station may support or oppose any candidate for public office. 47 U.S.C. Section 399.

[5] Even if White were a legally qualified candidate, his allegation that WPXI endorsed two candidates would not state a cause of action under our rules. WPXI is a commercial station. Consequently, Section 399 of the Communications Act does not apply. Furthermore, White did not claim that WPXI failed to notify opponents of those candidates endorsed or to offer them a reasonable opportunity to respond pursuant to Section 73.1930 of the Commission's rules. 47 C.F.R. Section 73.1930.

[6] White also complained of Gross' conduct in a letter to the Inspector General, who found no basis for either allegation against Gross. *See* Letter of March 11, 1993, by James C. Warwick, Inspector General.

[7] 47 U.S.C. Sections 154(j), 154(l), 208, and 404.

[8] White had made a different allegation against WDUQ in his complaint.

DISCUSSION

6. Section 315(a) of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to use its facilities it shall provide equal opportunities to all legally qualified opponents of such candidate. 47 U.S.C. Section 315(a). Section 312(a)(7) further provides that licensees must make available a reasonable amount of time to legally qualified candidates for federal office. 47 U.S.C. Section 312(a)(7). Section 73.1940 of the Commission's rules requires that to be legally qualified, candidates must either have qualified for a place on the ballot or must make a "substantial showing" that they have publicly committed themselves to election by the write-in method. 47 C.F.R. Section 73.1940. A "substantial showing" requires evidence of having engaged in activities commonly associated with political campaigning such as making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters. 47 C.F.R. Section 73.1940(f). Since Section 312(a)(7) and Section 315(a) apply only to legally qualified candidates, candidates claiming a right under these sections must be legally qualified. *See* 47 C.F.R. Section 73.1940.

7. While White asserted that he was a write-in candidate for the 1991 and 1992 elections, he made no showing of such candidacies. With respect to the 1994 race, White essentially conceded that he had not yet qualified for a place on the ballot when he requested equal opportunities when he stated in his complaint that he "may begin to circulate [his] nomination papers on March 4, 1994." White made no statement or claim that he was a write-in candidate for 1994, nor has White made any subsequent showing that he has since become legally qualified. Consequently, White's allegations, including those deferred for consideration in this document, that the above-captioned stations violated Section 312(a)(7) or 315 in denying him time or violated Section 399 in opposing his candidacy must fail.

8. The procedural sections of the Act cited by White in Petition I provide no basis upon which to reconsider his complaints. Section 208 applies to common carrier facilities, not broadcast stations. As to the claim that Charles W. Kelley should have investigated the matter and issued an investigative report pursuant to Sections 4(l) and 404, this claim has no merit. Because there was no basis to proceed with White's complaints, there was no need to conduct an investigation and, therefore, no report. Additionally, White argues that he has not been afforded his right pursuant to Section 4(j) to appear "in person" before the Commission. However, through his letters and pleadings, White has appeared before the Commission,[9] and the Bureau, for reasons already stated, denied his complaint.[10]

9. As to his other allegations in Petition I, White merely repeats the bare and unsubstantiated allegations, that he was treated in an inappropriate manner by the staff and that an improper relationship exists between Gross and Wycoff. Moreover, a review of the file does not support White's version of the events. Our records indicate that in a telephone conversation in October 1992, Gross attempted to explain to White the Commission's requirements for establishing a *prima facie* complaint. However, before Gross could provide this information, White stated that it was Gross' responsibility to get him on the air and that he would not accept "no" for an answer. When Gross again attempted to explain the requirements of a *prima facie* case, White hung up the phone. There is no indication from the record that White was treated rudely. Further, White provides no evidence whatsoever to support his contention that an improper relationship exists between Gross and Wycoff. Consequently, Petition I must be denied.

10. With respect to Petition II, which involves stations WQED(TV) and WQEX(TV), White argues that the Commission has exceeded its authority in adopting a definition of legally qualified candidate different from that of the FEC. This contention is specious and without merit. The Commission is responsible for enforcing the Communications Act and is authorized to issue rules and definitions to implement its provisions. The Commission is not bound by definitions other agencies use for purposes of other rules. In Petition II, therefore, White has presented no basis upon which to reverse the Division's determination.

11. Last, as to the informal objection, the Commission eliminated the fairness doctrine in 1987. *Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff'd, Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). Consequently, there is no Commission requirement that broadcasters present contrasting views on controversial issues of public importance. Therefore, White's allegation that WPXI provided insufficient news coverage to his campaign cannot form the basis for a valid complaint.[11] Further, the Commission has long held that it has neither the expertise nor the authority to be the arbiter of the truth or falsity of matter that is broadcast. Since White provides no extrinsic evidence that WPXI deliberately falsified the news, we can take no action with respect to White's allegation that WPXI's newscasts contained incorrect information. *See Hunger in America*, 20 FCC 2d 150 (1969). Finally, White presents no evidence that WPXI's

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[9] The Supreme Court has held that "even though Section 4(j) provides that Any party may appear before the Commission and be heard in person or by attorney,' ... [this section] assures only the right to participate 'in person or by attorney' in the manner reasonably found by the Commission to be appropriate." *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 283-4, n.17 (1949).

[10] White also cites two prior Commission decisions in support of his alleged right under Section 4(j). However, his reliance on *WPRY Radio Broadcasters, Inc.*, 40 FCC 2d (1973) is misplaced as this case does not entail an interpretation of Section 4(j); rather it involves the validity of the reasons given by a station for refusing to offer time to a candidate who was admittedly legally qualified under our rules. Similarly, *Red River Broadcasting Co. v. FCC*, 98 F.2d 282 (1938), is inapplicable to White's assertion, since it did not concern 4(j). Rather, the issue therein concerned judicial relief for a party that had not yet exhausted all prescribed administrative remedies.

[11] Moreover, even when the Fairness Doctrine was in effect, it applied only to a broadcaster's news coverage in the following ways. If a news program dealt specifically with the question of why a particular candidate should or should not be elected, generally the issue presented was who among all the candidates should be elected. Each candidate constituted a separate "view" on this issue. Since under the Fairness Doctrine broadcasters needed only present significant contrasting views on controversial issues of public importance, they had the discretion, in presentingh) contrasting views on such issues in their programming, to select those candidates whom they considered significant.

alleged "co-operative agreements" with other broadcast stations and alleged joint venture with the local cable provider are improper in any way.[12]

CONCLUSION

12. In light of the above, the Petitions for Reconsideration ARE DENIED, the complaints not resolved in our March 21, 1994, letter ARE DENIED, and the informal objection IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[12] White also alleges that principals of WPXI, WQED, and, WQEX have violated various provisions of the Federal Election Campaign Act. However, resolution of these matters is beyond our jurisdiction.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-120

In the Matter of

AT&T Communications Transmittal No. 6788
Tariff F.C.C. Nos. 9 and 11

ORDER

Adopted: October 14, 1994; Released: October 14, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. The Common Carrier Bureau (Bureau) recently released an order in the above captioned docket setting forth schedules for AT&T Corp. (AT&T) and interested parties to file a direct case, oppositions to the direct case, and rebuttals.[1] In the *Designation Order*, the Bureau directed AT&T to file its direct case no later than 14 days after the order's October 7, 1994 release date. Oppositions to the direct case were to be filed by interested parties no later than 7 days after the direct case was filed. AT&T was permitted to file a rebuttal no later than 7 days thereafter.

2. On October 13, 1994, AT&T filed a motion to extend time to file its direct case, requesting that the filing deadline be extended for two weeks beyond the originally established October 21 filing date. In its motion, AT&T claims that it did not obtain a copy of the *Designation Order* until three days after the order was released. AT&T also contends that, although it has previously addressed several of the six designated issues during the tariff review process, it must develop new analyses for the remainder of the issues raised in the *Designation Order*.

3. The Tariff Division has reviewed AT&T's request for extension of time and has determined that good cause exists to grant an extension for one week beyond the original dates for all pleadings. Therefore, AT&T's direct case is now due on October 28, 1994. Oppositions to the direct case must be filed by November 10, 1994, while AT&T's rebuttal is due no later than November 17, 1994.

ORDERING CLAUSE

4. Therefore, IT IS ORDERED that the motion filed by AT&T Corp. to extend the deadline for filing its direct case required by the *Designation Order* IS GRANTED, to the extent specified above.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[1] AT&T Communications Tariff F.C.C. Nos. 9 and 11, Transmittal No. 6788, Order Designating Issues for Investigation, CC Docket No. 94-120, DA 94-1118 (released October 7, 1994) (*Designation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY

Application for authority to acquire and operate capacity in the PacRimEast and Tasman-2 Cable Systems. File No. I-T-C-94-333

Application for authority to acquire and operate capacity in the Thailand-Vietnam-Hong Kong Cable System. File No. I-T-C-94-334

ORDER AND AUTHORIZATION

Adopted: October 5, 1994; Released: October 25, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-94-333 and I-T-C-94-334 ARE GRANTED, and American Telephone and Telegraph Company (AT&T) is authorized to:

a. modify its ownership of capacity in the PacRimEast Cable System, in accordance with the updated ownership schedules included in the Second Supplementary Agreement to the PacRimEast Construction and Maintenance Agreement (C&MA), to allow AT&T to acquire and operate half-interests in a total of 1320 jointly-assigned MAUOs and interests in eight wholly-assigned MAUOs[1] in the PacRimEast Cable System;

b. use the facilities in a. above to provide AT&T's regularly authorized services between the U.S. and the countries to be served via the PacRimEast Cable System;

c. modify its ownership of capacity in the Tasman-2 Cable System, in accordance with the updated ownership schedules included in the Third Supplementary Agreement to the Tasman-2 C&MA, to allow AT&T to acquire and operate half-interests in a total of 1140 jointly-assigned MAUOs and interests in eight wholly-assigned MAUOs in the Tasman-2 Cable System;

d. use the facilities in c. above to provide AT&T's regularly authorized services between the U.S. and Australia and New Zealand;

e. activate and operate previously authorized capacity in the Thailand-Vietnam-Hong Kong (T-V-H) Cable System and acquire by Indefeasible Right of User (IRU) a one-half interest in and operate additional facilities in that cable;

f. lease a one-half interest in and operate necessary overseas connecting facilities; and

g. use the facilities in e. and f. above to provide AT&T's regularly authorized services between the U.S. and the points to be served via the T-V-H Cable System.

3. IT IS FURTHER ORDERED that the authority herein is granted subject to the terms and conditions set forth in the C&MAs for the appropriate Cable Systems, as well as any Commission Order granting authority to acquire and operate facilities in the PacRimEast Cable System, the Tasman-2 Cable System or the T-V-H Cable System.

4. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] An MAUO is a 64-kbps circuit equivalent.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: October 25, 1994

CHEQUAMEGON TELEPHONE COOPERATIVE, INC. AND MAPLE TELEPHONE COOPERATIVE, INC. FILED A JOINT PETITION FOR WAIVER OF THE DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, APPENDIX-GLOSSARY, OF THE COMMISSION'S RULES AAD 94-124

Comment Date: December 2, 1994
Reply Date: December 23, 1994

On September 23, 1994, Chequamegon Telephone Cooperative, Inc. ("Chequamegon"), and Maple Telephone Cooperative, Inc. ("Maple") filed a joint petition for waiver of the definition of "Study Area" as set forth in Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the petitioners to reflect the changes in their study area boundaries that would result from Maple's sale of one telephone exchange (approximately 325 access lines) in Wisconsin to Chequamegon. Chequamegon and Maple are presently both participants in the National Exchange Carrier Association's common line and traffic sensitive pools. The petitioners state that this transaction has already been approved by the Public Service Commission of Wisconsin.

Interested parties may file comments on Chequamegon and Maple's petition on or before **December 2, 1994**, and reply comments on or before **December 23, 1994**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference AAD 94-124. Four (4) copies should also be sent to Adrian Wright, Cost Analysis Branch, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1208-1.1216. For further information contact Adrian Wright at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 90-287

In the Matter of

Northern California Public
Safety Plan

ORDER

Adopted: October 17, 1994; Released: October 25, 1994

By the Acting Chief, Land Mobile and Microwave Division and the Acting Chief, Spectrum Engineering Division:

1. The Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, accepted the Northern California (Region 6) Public Safety Plan (Plan) on November 20, 1990, 5 FCC Rcd 7123 (1990).

2. By letter dated May 9, 1994, the Region proposed to amend its Plan. The proposed amendment would, in part, revise the current channel allotments. The Commission placed the letter on Public Notice for comments due on September 15, 1994, 59 FR 42046 (August 16, 1994). The Commission received two comments, both of which urged the Commission to approve the proposed amendment.

3. We have reviewed the proposed amendment to the Region 6 Plan and, having received no comments to the contrary, conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED, That the Public Safety Radio Plan for Northern California (Region 6) IS AMENDED, as set forth in the Region's letter of May 9, 1994. This Amendment is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Rosalind K. Allen
Acting Chief, Land Mobile and
Microwave Division

Lawrence P. Petak
Acting Chief, Spectrum Engineering Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Petition of

Polnet Communications, Ltd.
licensee of
WKTA(AM), Evanston, Illinois

For Reconsideration of Public Notice
Announcing Interference Improvement
Factors for Stations Proposing to
Migrate to the AM Expanded Band

MEMORANDUM OPINION AND ORDER

Adopted: October 7, 1994; Released: October 13, 1994

By the Commission: Commissioner Barrett issuing a concurring statement.

1. The Commission has before it a petition filed by Polnet Communications, Ltd., licensee of WKTA(AM), Evanston, Illinois ("Polnet"), requesting reconsideration of the December 3, 1993 action of the Chief, AM Branch, acting pursuant to delegated authority, announcing interference improvement factors for stations that have petitioned to migrate to the AM expanded band.[1] Specifically, Polnet contends the staff erroneously interpreted Section 73.35 of the Commission's rules, which sets forth the formula for calculating improvement factors for prospective migrators to the expanded band. *See* 47 C.F.R. §73.35. Polnet further contends that the asserted error resulted in WKTA(AM) being credited with a lower than warranted improvement factor, adversely affecting WKTA(AM)'s eligibility to migrate to the expanded band.

2. *Background.* In the *AM Improvement Order, supra*, the Commission sought to transform and revitalize the AM broadcast service by adopting revised AM technical criteria, including rules to open ten newly available frequencies in the expanded band to those AM stations that significantly contribute to congestion and interference in the existing band.[2] In order to strictly manage migration to maximize the interference reduction benefits of each expanded band allotment awarded, the Commission established an order of priority for migration by existing licensees to the expanded band.[3] Daytime-only stations located in communities of more than 100,000 and within a Class A station's primary service area receive top priority for slots in the band if they notify the Commission that they seek to provide full-time service.[4] The next priority goes to full-time licensees who would most reduce interference and congestion by moving to the expanded band. The final priority belongs to other daytime-only stations. For ranking applicants within the respective full-time and daytime priorities, the Commission adopted improvement factors consisting, where applicable, of the sum of two ratios, one for nighttime interference-caused area to nighttime interference-free service area and one for daytime interference-caused area to daytime interference-free service area. *See AM Improvement Order*, 6 FCC Rcd at 6308-6311; *see also* 47 C.F.R. §73.35. The larger the improvement factor, the greater the improvement in the existing band if the station causing the interference migrates to the expanded band. Pursuant to 47 C.F.R. §73.30, licensees seeking to migrate to the expanded band have filed petitions to migrate, and the subject stations have been ranked according to their improvement factors within each of the three categories of stations eligible to migrate to the expanded band.[5] Specifically, stations in priority one were ranked 1 to 4, stations in priority two ranked 5 to 332, and stations in priority three ranked 333 to 688.[6] WKTA(AM), a daytime-only station, received a ranking of 640 based on an interference improvement factor of 0.0099.

3. *Polnet's Contentions.* Polnet requests that the Commission recalculate the improvement factors in view of an asserted error in excluding multiple-station interference areas from the daytime caused-interference areas of prospective migrators. Polnet contends that in calculating the

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[1] *See FCC Announces the Interference Improvement Factors for Stations which have Petitioned to Migrate to the Expanded Broadcast Band*, Public Notice (December 3, 1993). The expanded band consists of ten AM broadcast channels allotted by the Commission to the 1605-1705 kHz band. *See In Review of the Technical Assignment Criteria for the AM Broadcast Service*, 6 FCC Rcd 6273 (1991), *recon. granted inb part and denied in part*, 8 FCC Rcd 3250 (1993) [hereinafter *AM Improvement Order*]. Polnet filed a petition to migrate to the expanded band on June 30, 1993. WKTA(AM) is a Class D AM station licensed to operate on the frequency 1330 kHz with operating power of 5000 watts daytime and 17 watts nighttime using a directional antenna system during daytime hours only. Petitions requesting reconsideration of final actions taken pursuant to delegated authority may be referred by such authority to the Commission, as in the instant case. *See* 47 C.F.R. §1.106(a)(1).

[2] The Commission found that migration to the expanded band would produce a general reduction in interference levels in the existing AM band in furtherance of the goal for existing band stations of full-time operation, competitive technical quality, wide area daytime coverage, and nighttime coverage at least 15% of daytime coverage. *See AM Improvement Order*, 6 FCC Rcd at 6303, n.41.

[3] The Commission restricted eligibility for expanded band authorizations to existing AM licensees in order to redress unique technical problems present in the AM service, but noted that its action should not be taken to suggest any generalized Commission policy favoring existing licensees over new entrants in other services where new or expanded opportunities may arise. *See AM Improvement Order*, 6 FCC Rcd at 6276.

[4] *See* 8 FCC Rcd at 3255. This priority is based on Section 331(b) of the Communications Act of 1934, as amended, which reflects a legislative determination that enabling such stations to offer full-time local service would be a significant benefit to the public interest. *See* 47 U.S.C. §331(b); *see also In re Amendment of Section 331 of the Communications Act of 1934 ("Policy Statement")*, 7 FCC Rcd 4905 (1992).

[5] *See Federal Communications Commission To Open "Filing Window" on AM Expanded Band Applications*, Public Notice (April 15, 1993).

[6] Daytime-only stations having an improvement factor equal to 0.0 are not eligible to migrate to the expanded band. *See AM Improvement Order*, 6 FCC Rcd at 6311, n.50.

composite degree of service lost by co-channel and adjacent-channel stations as a result of interference caused by a prospective migrator, and, specifically, the amount of interference improvement that would be obtained through migration of that station to the expanded band, the staff improperly excluded from the calculation of interference caused by the prospective migrator those areas in which the migrator is not the exclusive contributor of interference. Polnet maintains that this methodology contravened Section 73.35 of the Commission's rules, and that the asserted error resulted in unrealistically small improvement factors for stations such as WKTA(AM).[7]

4. *Discussion.* The *AM Improvement Order* sought to restore the overall integrity of the AM service by reducing the interference with which AM broadcasters must contend in their primary service area. *See AM Improvement Order*, 6 FCC Rcd at 6276. Consistent therewith, Section 73.35 of the Commission's rules provides, in relevant part, that in calculating the daytime improvement factor of an AM station petitioning to migrate to the expanded band, "the composite amount of service lost by co-channel and adjacent channel stations each taken individually, that are affected by the subject station, excluding the effects of other assignments during each study, will be used as the numerator of the daytime improvement factor. The denominator will consist of the actual daytime service area (0.5 mV/m) less any area lost to interference from other assignments." *See* 47 C.F.R. §73.35.4[8] Polnet contends that the language of Section 73.35, specifically the phrase "excluding the effect of other assignments," plainly requires that the Commission determine the entire area of interference caused by a prospective migrator to co-channel and first-adjacent stations, excluding the effects of other stations causing interference within that area, and that, accordingly, WKTA(AM)'s interference-caused area, and hence its improvement factor, should be greater.[9] Thus, Polnet would have us credit WKTA(AM) with reducing interference by migrating, even though the areas in which WKTA(AM) would no longer cause interference would continue to receive interference from other stations.

5. The staff interpreted Section 73.35 correctly. In the *AM Improvement Order*, 6 FCC Rcd at 6310, the Commission adopted a nighttime interference factor along the lines proposed in its earlier *Notice of Proposed Rulemaking*, 5 FCC Rcd 4381 (1990). The Commission also decided to adopt a daytime improvement factor, and stated "... we are adopting the same approach for calculating the daytime improvement factor that we proposed in the *Notice* for the nighttime ... . This method is a logical extension of the nighttime interference factor." *Id.* In calculating a prospective migrator's nighttime interference improvement factor, Section 73.35 requires consideration of the contribution of all interfering nighttime stations and the migrator is credited only with areas from which it would remove interference and which do not receive interference from other stations. The staff's interpretation of Section 73.35 resulted in a similar manner of calculating the daytime improvement factor, and was fully consistent with maximizing interference reduction, which was one of the primary objectives of the *AM Improvement Order*.[10]

6. The phrase "excluding the effect of other assignments," as used in Section 73.35 means that in calculating the total area of interference caused to co-channel and first-adjacent channel stations by a prospective migrator, the part of that area receiving interference from other assignments should be excluded. Expanded band improvement factors are based on two distinct considerations: (a) service area lost by other stations due to interference caused by the present facilities of a prospective migrator, and (b) present service area of the prospective migrator. *See* 47 C.F.R. §73.35. The Commission's rules define an AM station's primary service area as that area in which the groundwave is not subject to objectionable interference or objectionable fading. *See* 47 C.F.R. §73.14. Upon completion of the channel change by such a migrator, the service areas of existing band co-channel and adjacent channel stations in which the migrator currently causes objectionable interference would be truly interference-free. In contrast, if the improvement factors were to include areas in which a migrator's co-channel and first-adjacent channel stations receive objectionable interference from stations other than the migrator, the interference reduction benefit of a migrator's proposed migration in a multiple-station interference area would be marginal at best, as the co-channel and first-adjacent channel stations would continue to receive objectionable interference in the relevant area from other assignments. Excluding multiple-station interference areas from a prospective migrator's caused-interference area is also consistent with the prescribed method for calculating the migrator's actual daytime service area ("service-provided"), which excludes any area lost to interference from other assignments. *See* 47 C.F.R. §73.35. Notably, the service-provided component of the daytime improvement ratio only credits the prospective migrator with that area of interference improvement actually afforded by its proposed migration.

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[7] Polnet asserts that had the Commission included multiple station interference areas in the determination of daytime improvement factors, WKTA(AM)'s improvement factor would increase from 0.0099 to 1.9942 and the station's corresponding ranking would rise from 640 to 361. Polnet concedes, however, that this recalculated ranking assumes the ranking of no other station would change. However, because the rankings of other stations would need to be recalculated if WKTA's petition were granted, WKTA(AM)'s recalculated ranking would depend upon the recalculated rankings of all other prospective migrators.

[8] The Commission declined to consider the effects of stations operating on second and third-adjacent channels both because the rules regulating second and third-adjacent channel spacings permit such stations to operate close to each other and because such rules are intended to control receiver cross-modulation and inter-modulation problems and do not lend themselves to accurate determinations of areas of interference. *See AM Improvement Order*, 6 FCC Rcd at 6310, para. 122. The degree of interference used in calculating an improvement factor is obtained from determining the size of the area experiencing the interference and does not specifically take into account the population within the area affected. *Id.* at 6 FCC Rcd at 6316, para. 139.

[9] *See*, note 7, *supra*.

[10] The Commission specifically noted that "[m]igration of AM stations from the existing band should reduce interference and congestion in the existing band and should offer a prompt method for establishing service in the expanded band." *See AM Improvement Order*, 6 FCC Rcd at 6302-6303, para. 99.

7. Based on the foregoing, we affirm the staff calculations of interference improvement factors as released on December 3, 1993 action. Accordingly, the petition for reconsideration filed by Polnet Communications IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CONCURRING STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

In Re: Petition of Polnet Communications, Ltd., licensee of WKTA(AM), Evanston, Illinois for Reconsideration of Public Notice Announcing Interference Improvement Factors for Stations Proposing to Migrate to the AM Expanded Band

Pursuant to today's action, the Commission reaffirms its prior decision regarding interference improvement factors for stations that have petitioned to migrate to the AM expanded band. As a result of my continued misgivings about the decision's potential impact on small radio station businesses, including minority owned stations, I must concur in this decision.[1]

While I support the Commission's goal to address the technical problems of AM service, I renew my concern about the inequities of the Commission's extension of priority status, reportedly founded in sound public policy, to certain entities in the expanded band. Meritorious arguments for equitable treatment that were substantiated by statistical evidence and presented by small and minority owned business, have been and continue to be ignored. Today's decision only serves to heighten my concerns about the manner in which the Commission determines the fate of these businesses by exacting arbitrary regulatory treatment. Therefore, as it proceeds with the implementation of the AM expanded band policies, I urge the Commission to revisit its impact on small and minority-owned businesses.

[1]See, Concurring Statement of Commissioner Andrew C. Barrett, Report and Order, 6 FCC Rcd 6468 (1991); See also, Concurring Statement of Andrew C. Barrett, Second Report and Order, 8 FCC Rcd 3250 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-248

In the Matter of

Amendment of Section 73.202(b), RM-8321
Table of Allotments,
FM Broadcast Stations.
(Pleasant City, Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 18, 1994; Released: October 25, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Peter L. Cea ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 7073 (1993), proposing the allotment of Channel 232A to Pleasant City, Ohio, as the community's first local aural transmission service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted.[1] Comments were also filed by Beaverkettle Company ("Beaverkettle") to which petitioner responded.

2. Beaverkettle, licensee of Station WHBC-FM, Channel 231B, Canton, Ohio, does not oppose the allotment of an FM channel to Pleasant City. However, it requests that Channel 221A, instead of Channel 232A, be allotted. Beaverkettle states that under the present Emergency Broadcast System ("EBS") plan for the east central Ohio operational area, Station WHBC-FM, along with its sister station, WHBC(AM), are the CPCS-1 stations for Guernsey and Coshocton counties. Thus, all of the stations in the area monitor Stations WHBC-FM and WHBC(AM) for activation of the EBS service, alerting them to a variety of emergency situations such as storm warnings, hazardous weather conditions, flooding and other national, regional and local emergencies. Beaverkettle acknowledges that Channel 232A at Pleasant City would not be short-spaced to Station WHBC-FM. However, it contends that destructive interference would occur to the reception of Station WHBC-FM in all or most of Guernsey and Coshocton Counties. Beaverkettle believes that this interference would cause a major disruption in the EBS operational plan and does not know whether affected stations could find an alternative CPCS-1 to monitor.

3. Beaverkettle states that an additional benefit would accrue from the allotment of Channel 221A to Pleasant City. It states that the site restriction proposed for Channel 232A at Pleasant City would enable the station to comply with the mileage separation requirements to all existing and proposed stations. However, while the site restriction complies with the spacing requirements to the outstanding construction permit of Station WFCB (BMPH-891102IC), Channel 232B1, Chillicothe, Ohio, it remains short-spaced to the allotment reference coordinates. Therefore, the *Notice* pointed out that final licensing of the new Pleasant City station would be withheld until Station WFCB is licensed at the transmitter site specified in the construction permit. However, no such short-spacing exists with respect to Channel 221A. Therefore, it believes that the allotment of Channel 221A could result in the initiation of new service at an earlier date.

4. Petitioner, in response, notes that Channel 221A would be short-spaced to translator Station W221AR, Coshocton, Ohio, for which a construction permit has been granted to Raven Ridge Ministries, Inc. He also questions whether the existence of the Cambridge Municipal Airport would affect the availability of a transmitter site. However, he concludes that Channel 221A is a "viable alternative."

5. We believe the public interest would be served by allotting Channel 221A to Pleasant City since it could provide the community with its first local aural transmission service. We believe that Channel 221A is the preferable channel since it may be possible to activate service at an earlier date. Channel 232A is dependent upon the licensing of Station WFCB at Chillicothe while no such contingency exists with Channel 221A. We recognize that Channel 221A at Pleasant City is short-spaced to translator Station W221AR at Coshocton. However, translators are secondary services and not entitled to protection from full service stations. As to the concern that the existence of the Cambridge Municipal Airport might affect the availability of transmitter sites, we find that petitioner has provided no showing that would demonstrate that the airport in any way impinges on the availability of suitable transmitter sites. In fact, petitioner himself states that Channel 221A is a viable alternative to Channel 232A.[2]

Technical Summary

6. Channel 221A can be allotted to Pleasant City in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.7 kilometers (7.2 miles) northeast to avoid a short-spacing to Station WMPO-FM, Channel 221A, Middleport, Ohio.[3] Canadian concurrence in the allotment has been received since Pleasant City is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

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[1] Petitioner has also complied with the request in the *Notice* that he submit an affidavit verifying that the statements contained in the petition were accurate to the best of his knowledge.

[2] We recognize that Beaverkettle requested the allotment of Channel 221A in part because of its belief that destructive interference would be caused to the reception of its Station WHBC-FM by a Pleasant City station operating on Channel 232A. However, we would like to point out that this is not a sufficient reason to warrant the allotment of an alternative channel. FM stations are afforded protection from interference only to the extent provided by the distance separation requirements and the rules governing maximum power and antenna heights and Channel 232A could have been allotted to Pleasant City in compliance with those requirements.

[3] The coordinates for Channel 221A at Pleasant City are North Latitude 40-00-00 and West Longitude 81-29-30.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 9, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Pleasant City, Ohio	221A

8. The window period for filing applications will open on **December 9, 1994**, and close on **January 9, 1995.**

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-70

In the Matter of

Amendment of Section 73.202(b), RM-8168
Table of Allotments,
FM Broadcast Stations.
(Wellton, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 19, 1994; Released: October 25, 1994

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 2244 (1993), issued in response to a petition filed on behalf of Farmworkers Communications, Inc. ("petitioner") proposing the allotment of Channel 283C2 to Wellton, Arizona, as that community's first local aural transmission service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 283C2 to Wellton since it would provide a first local aural transmission service to the community. Channel 283C2 can be allotted to Wellton consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules provided the transmitter is located at least 7.6 kilometers (4.7 miles) northwest of the community at coordinates 32-42-40 and 114-12-15.[1] As Wellton is located within 320 kilometers (199 miles) of the United States-Mexico border, concurrence of the Mexican government in this proposal was obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 9, 1994,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Wellton, Arizona, as follows:

City	Channel No.
Wellton, Arizona	283C2

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. Current Window period for filing applications for Channel 283C2 at Wellton, Arizona, will open on **December 9, 1994,** and close on **January 9, 1995.**

6. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process for Channel 283C2 at Wellton, Arizona, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Although the *Notice* proposed the allotment of Channel 283C2 to Wellton without a site restriction, it was subsequently determined that the nonrestricted site conflicted with a proposal to add Channel 282B at Sonoita, Sonora, Mexico, at coordinates 31-51-53 and 112-46-30. Therefore, pursuant to a bi-lateral agreement with the Mexican government, the coordinates for the Wellton proposal were revised accordingly to avoid the noted short spacing conflict at Sonoita.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-276

In the Matter of

Amendment of Section 73.202(b), RM-8353
Table of Allotments,
FM Broadcast Stations.
(Franklinton, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 19, 1994; Released: October 25, 1994

By the Acting Chief, Allocations Branch:

1. At the request of GACO Broadcasting Corporation ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 7912 (1993), proposing the allotment of Channel 255A to Franklinton, Louisiana, as the community's first local FM service. Petitioner filed comments and reply comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 255A to Franklinton, Louisiana, since it could provide the community with its first local FM service. Channel 255A can be allotted to Franklinton in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 9, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Franklinton, Louisiana	255A

4. The window period for filing applications will open on **December 9, 1994,** and close on **January 9, 1995.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 255A at Franklinton are North Latitude 30-50-54 and West Longitude 90-09-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-286

In the Matter of

Amendment of Section 73.202(b) RM-8377
Table of Allotments,
FM Broadcast Stations.
(Jeffersontown, Shelbyville and
Richmond, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 18, 1994; Released: October 26, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Channel Chek, Inc. ("Channel Chek"), licensee of Station WLSY(FM), Channel 269A, Jeffersontown, Kentucky, WCBR Radio, Inc. ("WCBR"), licensee of Station WMCQ(FM), Channel 269A, Richmond, Kentucky, and Shelby County Broadcasting, Inc. ("SCBI"), licensee of Station WTHQ(FM), Channel 267A, Shelbyville, Kentucky ("petitioners"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 8251 (1993), proposing the substitution of Channel 268C3 for Channel 269A at Richmond, Kentucky, and the modification of Station WMCQ(FM)'s license accordingly. In order to accommodate the upgrade at Richmond, petitioners also requested the substitution of Channel 267A for Channel 269A at Jeffersontown, Kentucky, and the modification of Station WLSY(FM)'s, license accordingly; the substitution of Channel 269A for Channel 267A at Shelbyville, Kentucky, and the modification of Station WTHQ(FM)'s license accordingly. Channel Chek and SCBI filed comments in support of the proposal reaffirming their intention to apply for the respective channels, if allotted.[1] No other comments were received.

2. As indicated in the *Notice*, petitioners stated that the proposed Class A channel substitutions will enable Stations WLSY(FM) and WTHQ(FM) to operate as 6.0 kilowatt facilities. Petitioners claimed that such improvement is in the public interest, since it would increase the efficient utilization of the broadcast spectrum and allow petitioners to better serve their respective service areas. Petitioners also noted that their stations are precluded from upgrades on their present channels with the existing operation, and that the change in channels would allow the stations to upgrade.

3. We believe the public interest would be served by substituting Channel 267A for Channel 269A at Jeffersontown, Kentucky, and by substituting Channel 269A for Channel 267A at Shelbyville, Kentucky, since it would enable Stations WLSY(FM) and WTHQ(FM) to operate at maximum Class A facilities. An engineering analysis has confirmed that all aspects of the proposal comply with the Commission's minimum distance separation requirements. Channel 267A can be allotted to Jeffersontown in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.2 kilometers (3.8 miles) northeast, in order to avoid a short-spacing to Station WKKG(FM), Channel 268B, Columbus, Indiana, and to a construction permit for Station WRZI(FM), Channel 268A, Vine Grove, Kentucky.[2] Channel 269A can be allotted to Shelbyville in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.1 kilometers (3.8 miles) east, to avoid a short-spacing to Station WKYL(FM), Channel 271A, Lawrenceburg, Kentucky.[3] In accordance with Section 1.420(g)(3) of the Commission's Rules, we also modify the license of Station WLSY(FM) to specify operation on Channel 267A in lieu of Channel 269A at Jeffersontown, Kentucky, and the license of Station WTHQ(FM) to specify operation on Channel 269A lieu of Channel 267A at Shelbyville, Kentucky.

4. In recognition of the Commission's policy concerning the involuntary relocation of an authorized transmitter site, petitioners state that they have a joint agreement consenting to share the cost for change in the authorized transmit-

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[1] On November 19, 1993, WCBR filed a notice of withdrawal requesting that its proposal for the substitution of Channel 268C3 for Channel 269A at Richmond, Kentucky, be withdrawn from the instant rule making proceeding, so that Station WMCQ(FM) could pursue its request through the "one-step" application process. *See FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993). We will grant WCBR's request.

[2] The coordinates for Channel 267A at Jeffersontown are North Latitude 38-13-41 and West Longitude 85-30-30.

[3] The coordinates for Channel 269A at Shelbyville are North Latitude 38-12-48 and West Longitude 85-09-13.

We note that the coordinates for Channel 269A at Shelbyville are short-spaced to the proposed site (37-52-21 and 84-19-40) of WCBR's pending "one-step" upgrade application (File No. BPH-931130IA) for Channel 268C3 at Richmond, Kentucky. Since WCBR's proposed application site does not meet technical requirements, it has requested that its application be processed under the contour protection provisions of Section 73.215 of the Commission's Rules. Section 73.215 allows stations to be short-spaced to other short-spaced assignments, applications and allotments, provided contour protection is achieved. Therefore, applicants requesting short-spaced assignments pursuant to this section, must take into account the ERP and antenna HAAT of the station in the direction of the contours of other short-spaced assignments, applications and allotments. If a directional antenna is proposed, the pattern of that antenna must be used to calculate the ERP in particular directions and meet the additional requirements of Section 73.316. *See* Section 73.215 of the Commissions Rules; *see also Channel and Class Modifications by Application, supra; Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *recon. granted in part*, 8 FCC Rcd 4743 (1993).

ter site for Station WLSY(FM) at Jeffersontown and Station WTHQ(FM) at Shelbyville, as well as the exchange of channels.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 12, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Jeffersontown, Kentucky	267A
Shelbyville, Kentucky	269A

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Channel Chek, Inc., for Station WLSY(FM), Jeffersontown, Kentucky, IS MODIFIED to specify operation on Channel 267A in lieu of Channel 269A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WLSY(FM)'s license, BLH-900516KC, except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-900516KC, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Shelby County Broadcasting, Inc., for Station WTHQ(FM), Shelbyville, Kentucky, IS MODIFIED to specify operation on Channel 269A in lieu of Channel 267A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WTHQ(FM)'s license, BLH-891124KA, except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-891124KA, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That at the request of WCBR Radio, Inc., the proposal for the substitution of Channel 268C3 for Channel 269A at Richmond, Kentucky, IS DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-286

In the Matter of

Amendment of Section 73.202(b), RM-8513
Table of Allotments,
FM Broadcast Stations.
(Atlantic and Glenwood, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 18, 1994; Released: October 26, 1994

Comment Date: December 19, 1994
Reply Comment Date: January 3, 1995

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Valley Broadcasting, Inc. ("petitioner"), requesting the reallotment of Channel 279C from Atlantic to Glenwood, Iowa, and the modification of Station KXKT's license to specify Glenwood as its community of license. Petitioner failed to state its intention to apply for Channel 279C, if reallotted to Glenwood. It is therefore requested to do so in comments herein.

2. Petitioner seeks modification of Station KXKT's license pursuant to the provisions of Section 1.420(i) of the Commission's Rules which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. Atlantic and Glenwood are located approximately 29 kilometers apart whereas the Commission's Rules require a minimum distance separation of 290 kilometers for co-channel Class C allotments. Therefore, the use of Channel 279C at Glenwood is mutually exclusive with its use at Atlantic. Petitioner submits that the adoption of its proposal would result in a preferential arrangement of allotments since it would provide Glenwood with its first local aural transmission service. Atlantic would not lose its sole local aural transmission service as it would still receive such service from fulltime AM Station KJAN.[1] Atlantic has a 1990 U.S. Census population of 7,432 persons. Petitioner states that Glenwood is an incorporated city, with a 1990 U.S. Census population of 4,571 persons, and the seat of Mills County. In addition, it states that Glenwood has its own municipal government, police department, county sheriff, volunteer fire department, post office and zip code. Glenwood also has its own elementary, middle and high schools, as well as shopping centers, a business district, two banks, two savings and loan associations, and medical professionals.

3. Based on the information before us, we are unable to tentatively conclude that petitioner's proposal would result in a preferential arrangement of allotments. It is true that the reallotment of Channel 279C to Glenwood would provide that community with its first local aural transmission service while not depriving Atlantic of its sole local transmission service. However, the petitioner did not provide any technical study showing what areas and populations would gain and lose reception service as a result of the reallotment. Therefore, petitioner is requested to provide such a study in its comments herein. In this regard, we note that while Glenwood is not located within any Urbanized Area, the petitioner's proposed transmitter site is but 3 kilometers (1.9 miles) from the Omaha Urbanized Area. Therefore, we request that petitioner also provide information specify what portion of any population gain is the result of coverage of the Omaha Urbanized Area.

4. We believe the public interest would be served by soliciting further comments on this proposal since it could provide Glenwood with its first local aural transmission service, if granted. We also propose to modify petitioner's license for Station KXKT to specify Glenwood as its community of license. In compliance with Section 1.420(i), we will not accept competing expressions of interest in use of Channel 279C at Glenwood. Channel 279C can be allotted to Glenwood in compliance with the Commission's minimum distance separation requirements with a site restriction of 24.6 kilometers (15.3 miles) north of Glenwood to accommodate petitioner's desired transmitter site.[2]

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Atlantic, Iowa	279C	--
Glenwood, Iowa	--	279C

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 19, 1994**, and reply comments on or before **January 3, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

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[1] Petitioner also submits that there are five FM channels which can be allotted to Atlantic. However, as stated in *Change of Community MO&O*, 5 FCC Rcd 7094 (1990), the replacement of an existing station with a vacant allotment does not obviate the disruption caused by the removal of the operating station.

[2] The coordinates for Channel 279C at Glenwood are 41-15-49 North Latitude and 95-46-21 West Longitude.

John M. Pelkey, Esq.
Susan H. Rosenau, Esq.
Haley, Bader & Potts
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633
(Counsel to petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-56

In re Applications of

CHESTNUT BROADCASTING COMPANY — File No. BRH-900604YE

For Renewal of License of
Station KBER-FM,
Ogden, Utah

STREET STRYDER — File No. BRH-900601A3

For Renewal of License
of Station KUJJ-FM[1]
Spanish Fork, Utah

STREET STRYDER — File No. BALH-940119GE
Assignor

and

BAJAMAR BROADCASTING, L.L.C.
Assignee

For Consent to Assignment of
Station KUJJ-FM
Spanish Fork, Utah

MEMORANDUM OPINION AND ORDER

Adopted: October 19, 1994; Released: October 26, 1994

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority,[2] has before it a Petition for Distress Sale Relief filed January 18, 1994, by Street Stryder ("Stryder"); and an Application for Consent to the Assignment of Station KUJJ-FM from Stryder to Bajamar Broadcasting, L.L.C. ("Bajamar"). Stryder seeks permission to assign the KUJJ-FM license to Bajamar pursuant to the Commission's minority distress sale policy. We will grant Stryder's request.

BACKGROUND

2. By *Hearing Designation Order and Notice of Forfeiture*, 8 FCC Rcd 2493 (1993), the Commission designated for hearing the applications for renewal of license of C. Devine Media, Inc.[3] ("Devine") and of Stryder, on the following issues:

> (a) to determine whether Devine and Stryder violated Section 73.3555(a)(2) of the Commission's Rules by engaging in a sham assignment of the license of Station KQOL-FM, Spanish Fork, Utah, from Devine to Stryder;
>
> (b) To determine whether Stryder violated Section 73.3540 of the Commission's Rules and Section 310(d) of the Communications Act by engaging in an unauthorized assignment of the license of Station KQOL-FM to Steve Evans, the brother-in-law of Chris Devine, one of the principals of C. Devine Media, Inc.,
>
> (c) To determine whether Devine and Stryder violated Sections 73.1015 and 1.17 of the Commission's Rules by making misrepresentations to the Commission concerning the foregoing;
>
> (d) To determine, in light of the evidence adduced under the foregoing issues, whether Devine and Stryder possess the requisite qualifications to warrant the grant of the applications for renewal of the licenses of Station KBER-FM and KQOL-FM.

3. The Commission's general policy is that, where, as here, character qualifications issues have been designated against a licensee in a renewal or revocation hearing, the license cannot be assigned until the licensee is found qualified. *Jefferson Radio Co. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964). In *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978), the Commission established an exception to that proscription to allow distress sales to minority controlled entities. In order to qualify for distress sale relief, an applicant must satisfy three main criteria: 1) that the hearing has not yet commenced; 2) that the proposed transferee is minority controlled; and 3) that the station to be conveyed is sold at a maximum of 75% of its fair market value. *Lee Broadcasting Corp.*, 76 FCC 2d 462 (1980); *Clarification of Distress Sale Policy*, 44 RR 2d 479 (1978); *Statement of Policy*. The buyer and seller are each required to submit an appraisal of the fair market value of the station. *Lee Broadcasting Corp.*

DISCUSSION

4. The parties have met the threshold criteria for relief by distress sale. First, the hearing has not yet commenced. Second, Bajamar, the assignee, is minority controlled. Bajamar is a limited liability company organized under the laws of the state of Utah. Such a company affords its principals the same legal protections as a corporation, but is treated like a partnership for income tax purposes. Bajamar's manager and 21% owner, William J. Garcia, is Hispanic. Garcia has 51% voting control of Bajamar. *See*

[1] Formerly KQOL-FM.

[2] *See Faith Center, Inc.*, 54 RR 2d 1286, 1287 n.11 (1983); *Minority Ownership in Broadcasting*, 92 FCC 2d 849, 859 (1982).

[3] C. Devine Media, Inc. later changed its name to Chestnut Broadcasting Company ("Chestnut"). Chestnut has petitioned for distress sale relief as well. That petition is pending.

Minority Ownership in Broadcasting, at 854. Finally, the parties have shown that the sale price for KUJJ-FM is 75% of its fair market value.

5. The parties have submitted two appraisals of the stations by recognized media brokerage firms. One appraisal is by Blackburn & Co., Inc., and the other is by Star Media Group, Inc. Both value the station at $500,000 on the date of designation of the above-captioned proceeding for hearing. The total consideration to be paid under the sales contract is $375,000, which is 75% of the appraised value.

6. Stryder will provide seller financing for two-thirds of the $375,000 purchase price through a promissory note to be executed by Bajamar at closing. The rate of interest on the note is 10%. Both appraisals indicate that this interest rate is reasonable. Moreover, the contract provides that the seller will not retain a right of reversion, and will not have a right to reassignment of the station or a right to use the facilities. Under such circumstances, we do not consider execution of the promissory note to be a bar to approval of distress sale relief in this case.

7. The parties have disclosed all the facts and circumstances regarding the distress sale agreement, including the negotiations relating thereto and the consideration to be exchanged. *KND Corp.*, 48 RR 2d 631, 634 (1980). The assignment application has been processed. The assignee has been found fully qualified to be a Commission licensee.

ORDERING CLAUSES

8. ACCORDINGLY, IT IS ORDERED, That the Petition for Distress Sale Relief filed January 18, 1994, by Street Stryder IS GRANTED; And That the Application for Consent to the Assignment of Station KUJJ-FM from Stryder to Bajamar Broadcasting, L.L.C. (File No. BALH-940119GE) IS GRANTED. IT IS FURTHER ORDERED, That the application for renewal of license of KUJJ-FM (BRH-900601A3) IS GRANTED and this proceeding IS TERMINATED, as it pertains to Stryder and KUJJ-FM only, provided that if the pending assignment to Bajamar is not consummated within 90 days, the action taken herein shall be void and the renewal application for KUJJ-FM will be returned to hearing status.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition to Amend Part 13 of the Commission's Rules to Update Certification Requirements for Shipboard Radio Officers	RM-7902

ORDER

Adopted: October 19, 1994; Released: October 26, 1994

By the Chief, Private Radio Bureau

1. On January 10, 1992, The American Radio Association and the Wilderness Society (Petitioners) filed a petition for rule making to amend Part 13 of the Commission's Rules, 47 C.F.R. Part 13.[1] Specifically, the Petitioners request that the Commission amend then-Sections 13.21 and 13.22 of the Commission's Rules[2] to require commercial radio operators serving as shipboard Radio Officers be proficient in the operation, repair, and maintenance of modern communications and related electronics equipment on today's sea-going vessels.[3] Petitioners state these revisions are necessary to upgrade the qualifications and certification requirements of licensees who are involved with safety at sea and who can assist in averting or minimizing environmental damage resulting from disasters involving ocean-going vessels.[4]

2. The petitioners express concern that the questions the Commission used to prepare commercial radio operator examinations were inadequate to test a licensee's ability to perform what the petitioners believe are part of the current duties and responsibilities of a Radio Officer on a sea-going vessel. In the *Report and Order* updating the commercial operator rules, we agreed that a number of questions on the examinations were out of date, and stated that we would revise the examination questions so they reflected the state of the art and the current duties and responsibilities of commercial radio operator licensees.[5] We said we would update the examination questions by issuing a public notice soliciting possible new test questions and comments on the topics and number of questions in each examination element. Additionally, once the questions for each written examination element question pool were selected, we indicated we would release the questions and the algorithm for preparing examination question sets in a Public Notice.[6]

3. As part of the privatization process, the Commission has revised the commercial radio operator examination elements.[7] Revised question pools have been developed and released for all written examination elements[8] based on questions we received from individuals, employers, associations, and subject matter experts. We continue to receive comments and recommendations from any source regarding the questions in the question pools we have released. The petitioners, therefore, are encouraged to submit questions to be considered for inclusion in future revisions to the question pools.[9]

4. Because the question pools have been revised recently to reflect the state of the art and the current duties and responsibilities of commercial radio operator licensees based on input from individuals, employers, associations, and subject matter experts, and a procedure is available for revising the question pools as necessary, we find the petitioner's proposal is moot. Accordingly, pursuant to Section 1.401(e) of the Commission's Rules, 47 C.F.R. § 1.401(e), IT IS ORDERED that the Petition for Rule Making, RM-7902, filed by The American Radio Association and the Wilderness Society, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

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[1] *Public Notice*, Report No. 1877. The Commission received a comment from the American Institute of Merchant Shipping opposing the petition, and a comment from the National Wildlife Federation supporting the petition.

[2] Part 13 of the Commission's Rules was reorganized and revised to clarify and update the rules, as well as privatize the administration of commercial operator examinations, in 1993. *See Report and Order* FO Docket No. 92-206, 8 FCC Rcd 1046 (1993).

[3] Petition at 1.

[4] *Id.* at 3.

[5] *See Report and Order* at para. 14.S

[6] *Id.*

[7] A series of *Public Notices* was released soliciting private sector assistance in updating the commercial radio operator examinations. The *Public Notices* requested suggestions for topics and questions for the question pool for each examination element. *See*, for example, *Public Notice*, February 17, 1993, (DA 93-140) and August 10, 1993 (DA 93-865) soliciting questions for the GMDSS Radio Operator's and GMDSS Radio Maintainer's licenses.

[8] *See*, for example, *Public Notice* dated June 1, 1994, (DA 94-557 and 94-558) releasing the question pools for written examination Element 7 (GMDSS Radio Operator's License) and written examination Element 8 (Ship Radar Endorsement), and *Public Notice* dated August 3, 1994, (DA 94-838) releasing the question pools for Commercial Radiotelegraph Operator written examination Elements 5 and 6.

[9] Section 0.131(i) of the Commission's Rules, 47 C.F.R. §0.131(i), delegates authority to the Chief, Private Radio Bureau, to revise the common question pool for each Element, as appropriate.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CLEARVIEW CABLE TV, INC. File No. CSR-4247

Application for Waiver of Section 76.501(d) of the Commission's Rules.
47 C.F.R. § 76.501(d)

MEMORANDUM OPINION AND ORDER

Adopted: October 19, 1994; Released: October 19, 1994

By the Chief, Cable Services Bureau:

1. On March 24, 1994, Clearview Cable TV, Inc. ("Clearview"), filed a petition for special relief, requesting a waiver of the Commission's rules concerning cable operators' ownership and operation of satellite master antenna television ("SMATV") systems.[1] Clearview seeks this waiver in order to permit the sale of five SMATV systems it owns and operates to Sammons Communications of New Jersey, Inc. ("Sammons"). On July 27, 1994, Clearview filed a supplement to its petition for special relief. Clearview's waiver request is unopposed.

2. Sections 76.501(d) and (e) of the Commission's rules[2] implement Section 613(a)(2) of the Communications Act of 1934 (the "Act").[3] That section of the Act prohibits a cable operator from offering SMATV service "separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system."[4] The Act also permits the Commission to waive the prohibition to the extent necessary to ensure that all significant portions of a franchise area are able to obtain video programming.[5]

3. Clearview seeks a waiver of the SMATV-cable cross-ownership rules because Sammons is the cable franchisee in the area of the five SMATV systems it would purchase from Clearview. Clearview contends that three of the SMATV systems are located in areas of Sammons' franchise area that Sammons does not serve, and that a waiver to permit the sale of those systems is consistent with the Commission's rules.[6] The other two SMATV systems that Clearview seeks to sell to Sammons compete directly with Sammons for subscribers. Clearview states that it is in dire financial straits and contends that, under the circumstances presented, permitting the sale of these two SMATV systems to Sammons would be consistent with the statutory prohibition because it would ensure that all significant portions of the franchise areas in which Clearview provides services continue to receive a source of multichannel video programming.

4. *Legal and Regulatory Framework.* When it adopted its cross-ownership rules, the Commission observed that the cross-ownership provisions of Section 613 of the Act address Congress' concern that common ownership of different means of video distribution may reduce competition and limit the diversity of voices available to the public.[7] The Commission also noted that the Senate Committee had indicated in the *Senate Report* that cross-ownership rules were necessary to enhance competition and further diversity because they prevent cable operators from warehousing facilities that could be used by potential competitors, and because they prevent anti-competitive acts that would limit the types of services available.[8] Accordingly, the Commission concluded that the purpose of the statutory provision is to "encourage alternative providers of multichannel video services and to promote the development of local competition [to] established cable operators."[9]

5. When it adopted rules implementing the SMATV-cable cross-ownership restriction, the Commission determined that Congress intended that the SMATV-cable cross-ownership restriction be narrowly tailored.[10] As the Commission observed, the statutory provision does not prohibit all SMATV-cable cross ownership within a cable operator's actual service area.[11] Consequently, although the Commission adopted rules that prohibit a cable operator from acquiring an attributable ownership interest in a separate SMATV service within the cable operator's actual service area,[12] a cable operator is permitted to construct a stand-alone or integrated SMATV system in its actual service area, provided such SMATV service is offered in accordance with the terms and conditions of the cable franchise agreement.[13] Common ownership of a SMATV system that itself qualifies as a "cable system" under Section 602(7)(B) of the Act[14] and a separate stand-alone SMATV system is also permitted.[15] Finally, in the unserved portions of the franchise area, a cable operator is permitted to build or acquire a stand-alone SMATV system, provided

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[1] 47 C.F.R. § 76.501(d-e). Those rules are hereinafter referred to as the SMATV-cable cross-ownership rules.
[2] *Id.*
[3] 47 U.S.C. § 533(a)(2).
[4] *Id.*
[5] 47 U.S.C. § 533(a)(2)(B).
[6] Clearview Petition at 4-5.
[7] *Implementation of §§ 11 & 13 of the 1992 Cable Act (Horizontal & Vertical Ownership Limits, Cross-Ownership Limitations & Anti-Trafficking Provisions), First Report & Order* (hereinafter the *"First Cross-Ownership Report & Order")* ¶ 92, 8 FCC Rcd 6828, 6841 (1993), *recon. pending* MM Docket No. 92-264. *See also Report of the Senate Committee on Commerce, Science and Transportation,* S. Rep. No. 92, 102d Cong., 1st Sess. 46 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1179 *("Senate Report").*
[8] *First Cross-Ownership Report & Order* ¶ ¶ 92, 121, 8 FCC Rcd at 6858, 67-68 (citing *Senate Report* at 46-47, 1992 U.S.C.C.A.N. at 1179-80).
[9] *Id.* ¶ 121, 8 FCC Rcd at 6845.
[10] *Id.* ¶ 6, 8 FCC Rcd at 6829.
[11] *Id.* ¶ 119, 8 FCC Rcd at 6845.S
[12] *Id.* ¶ 6, 8 FCC Rcd at 6829.
[13] *Id.* ¶ ¶ 6, 122, 8 FCC Rcd at 6829, 45-46.g
[14] 47 U.S.C. § 522(7)(B).
[15] *First Cross-Ownership Report & Order* ¶ ¶ 95, 128, 8 FCC Rcd at 6842, 46-47; *Senate Report* at 81, 1992 U.S.C.C.A.N. at 1214.

such cable-owned SMATV system is operated in accordance with the terms and conditions of the cable franchise agreement.[16]

6. While the SMATV-cable cross-ownership restriction is narrowly tailored, the Commission did determine that a cable operator should not be allowed to acquire existing SMATV facilities within the cable operator's actual service area for the purpose of providing cable service.[17] In reaching this conclusion, the Commission observed that in "light of the important statutory objectives of promoting competition and encouraging diverse sources of programming, such acquisitions would undermine the goals of the cross-ownership restriction and eliminate an important potential source of competition for established cable operators."[18] Therefore, the Commission determined that allowing cable operators to acquire existing SMATV facilities would (1) undermine the goal of encouraging cable operators and SMATV providers to compete directly with one another, (2) reinforce existing cable monopolies and (3) reduce competitive opportunities for SMATV providers within the cable service area.[19]

7. Section 613(a)(2)(B) of the Act authorizes the Commission to waive the statutory cross-ownership requirements "to the extent the Commission determines is necessary to ensure all significant portions of a franchise area are able to obtain video programming."[20] The rules adopted by the Commission mirror this language, providing that the Commission will entertain requests to waive the cross-ownership restrictions where necessary to ensure that all significant portions of the franchise area are able to obtain multichannel video service.[21] The reach of this waiver authority is not addressed further in the context of the SMATV-cable cross-ownership restriction in the *First Report and Order*.

8. *Factual Background*. Clearview operates nine SMATV systems in New Jersey, serving approximately 3400 subscribers.[22] Clearview seeks to sell five of the SMATV systems, serving approximately 1125 subscribers, to Sammons. The five systems are all located in Absecon Town in Galloway Township in Atlantic County, New Jersey.[23] Of the four SMATV systems Clearview proposes to retain, two are located in Lawrenceville in Mercer County, New Jersey, and the other two are located in Cranberry in Middlesex County, New Jersey. Clearview states that its subscriber penetration rate is 66.9% and that little room exists for either growth or increased revenue among its SMATV systems.[24]

9. Clearview states that it is in default on a construction loan received from Phillips Credit Corporation ("Phillips").[25] Clearview notes that it owes over two million dollars to Phillips, that Phillips has deferred part of the monthly principal and thereby reduced the monthly payments but that it is still unable to make the reduced monthly payments, that it is losing approximately $20,000 per month and that Phillips is prepared to foreclose on the loan.[26]

10. Clearview has owned and operated the two SMATV systems in Cranberry, New Jersey – Rossmore and Clearbrook – since prior to 1989.[27] In 1989, Clearview acquired the Mattix Forge and Mattix Crossing systems in Absecon, New Jersey, and a partially constructed system at Society Hill I, also in Absecon, New Jersey from RCK. Clearview states that, since that acquisition, it completed construction of the Society Hill I system and constructed the remaining two Society Hill systems in Absecon and the two Lawrence Square Village systems in Lawrenceville, New Jersey.[28] Clearview states that its business plans included projections based upon an exclusive contract to construct SMATV systems in developments by K. Hovnanian Enterprises, Inc., in New Jersey, and rights of first refusal for developments in Florida and Pennsylvania. However, Clearview states that when Hovnanian slowed construction as a result of the sagging economy in the early 1990's, it found itself unable to meet its revenue projections and its loan payments to Phillips.[29]

11. Clearview represents that it will not realize any profit on the sale of the SMATV systems, but rather, that the sale of assets will allow it to pay down enough of the principal debt to Phillips so that its monthly payments will become more manageable and it will be able to continue operating its four remaining SMATV systems, which serve approximately 2283 subscribers.[30]

12. *Clearview's Arguments*. Clearview represents that the three Society Hill SMATV systems are located in contiguous condominium-style developments where Clearview operates without competition from any other multichannel video distributor.[31] Clearview states that while these three SMATV systems are in Sammons' franchise area, they are located in parts of the franchise area that Sammons does not serve. Clearview further represents that Sammons could not serve the three Society Hill developments by tapping existing curb drops. Rather, approximately 4.5 miles of underground cable would have to be laid to connect the 166 buildings, and the 884 units would have to

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16 *Id.* ¶ ¶ 6, 127, 8 FCC Rcd at 6829, 46.
17 *Id.* ¶ 123, 8 FCC Rcd at 6846.
18 *Id.*
19 *Id.*
20 47 U.S.C. § 533(a)(2)(B); *First Cross-Ownership Report & Order* ¶ 93, 8 FCC Rcd at 6841.
21 47 C.F.R. § 76.501(e)(2)(iii).
22 Clearview Petition at 2 n.2. The nine SMATV systems currently owned and operated by Clearview in New Jersey are: Society Hill I, serving 278 subscribers; Society Hill II, serving 295 subscribers; Society Hill III, serving 207 subscribers; Club III-Mattix Forge, serving 243 subscribers; Mattix Crossing, serving 102 subscribers; Lawrenceville I and Lawrenceville II, serving a combined total of 278 subscribers; Clearbrook, serving 1865 subscribers; and Rossmore, serving 140 subscribers. Clearview proposes to sell the three Society Hill systems, the Mattix Forge and Mattix Crossing systems to Sammons. *Id.*
23 *Id.*
24 *Id.* at 2.
25 Clearview Petition at 1.
26 *Id.*
27 Clearview Supplement at 3.
28 *Id.*
29 *Id.* at 4. Clearview notes that it also acquired systems serving 1800 subscribers in Somerset, New Jersey from RCK in 1989. Clearview states that these systems were subsequently sold to TKR, a local cable operator, prior to the enactment of the 1992 Cable Act and the proceeds were used to reduce the principal of the Phillips loan in an effort to make the monthly payments more manageable.
30 Clearview Petition at 2.
31 Clearview Supplement at 2.

be post-wired. Therefore, Clearview asserts that grant of a waiver to permit the transfer of those three systems is consistent with Section 76.501(e)(2) of the Commission's rules, which permits cable operators to acquire and operate SMATV systems in unserved areas of the cable operator's franchise area.[32] Clearview contends that while the term "unserved portions of the franchise area" is not defined for purposes of the SMATV-cable cross-ownership rules, the term "area served by a cable system" is defined in Section 76.501(e)(2)(ii) as "any area actually passed by a cable system and which can be connected for a standard connection fee."[33] Consequently, Clearview argues that the three systems that Sammons has not wired represent "unserved portions" of Sammons' franchise area for purposes of the cross-ownership rules (i.e., the non-wired systems are not "passed" by Sammons and cannot be connected to Sammons' system for a standard connection fee).[34]

13. The two other SMATV systems involved in the proposed transaction, the Mattix Forge and Mattix Crossing systems in Absecon, are located in multiple dwelling units ("MDU's") served by both Clearview and Sammons.[35] A total of 626 households are passed in those two systems, 199 of which are served by Sammons and 345 of which are served by Clearview. Clearview recognizes that permitting Sammons to acquire those two systems would result in a loss of competition within the MDUs.[36] However, Clearview contends that less than fourteen percent of its total SMATV subscribers would lose the ability to select from competing providers of multichannel video programming.

14. Clearview notes that among the four SMATV systems it intends to retain, there are competing multi-channel video programming distributors for two of the four systems. In particular, Clearview states that it is the sole provider of multichannel video programming for its 1865 subscribers in the Clearbrook system, in Cranberry, and to the 140 subscribers in the Rossmore system.[37] On the other hand, its two Lawrence Square Village SMATV systems are within the franchise area of Comcast of Mercer County, and Clearview represents that it directly competes with Comcast for subscribers in those systems. Clearview states that it has attained a penetration level of approximately 47% with 278 subscribers in those two systems, while Comcast has a penetration level of approximately 25%.[38] Clearview provides this information in an effort to demonstrate that if it is not permitted to sell the five systems in Absecon to Sammons, the net result will be that a majority of its subscribers will be left without any multi-channel video programming because of the impending foreclosure and bankruptcy, and that none of its subscribers will be able to select between competing multichannel video programming distributors ("MVPD's").

15. Clearview represents that it has endeavored in good faith to locate a buyer for its Society Hill and Mattix SMATV systems. Clearview states that it actively marketed the systems to: (1) cable operators that are not franchised to serve the area where the five SMATV systems are located, including TKR, Comcast and Storer; (2) ACS Enterprises, a Philadelphia SMATV and wireless cable operator; (3) Telecomm, Inc., and other SMATV operators; and (4) a private cable investor.[39] However, Clearview states that Sammons was the only party that expressed any interest in acquiring the systems.[40]

16. Clearview contends that in enacting the SMATV-cable cross-ownership prohibition, Congress sought to ensure that a diversity of voices are available to the public and to limit potential anti-competitive activity. However, Clearview contends that where SMATV subscribers face the loss of their only source of multi-channel video programming service, Congress saw the need to permit waivers of the rule "to the extent the Commission determines is necessary to ensure that all significant portions of a franchise area are able to obtain video programming," and deliberately included this provision as a safeguard to ensure that at least one source of multi-channel video programming is available to all potential subscribers.[41] Clearview contends that the Commission's rule allowing cable operators to acquire or construct SMATV systems in unserved areas within their franchise area was adopted in recognition of this safeguard.[42]

17. Clearview also asserts that grant of its requested waiver would be consistent with Commission precedent pertaining to the granting of waiver in the context of the cable-television cross-ownership rules. Clearview contends that the rationale underlying the cable-television cross-ownership restriction -- to secure a diversity of voices by preventing the concentration of video programming sources in a market in the hands of any one television station licensee -- is similar to the rationale underlying the SMATV-cable cross-ownership rules.[43] Therefore, Clearview asserts, the reasoning applied by the Commission in *Falcon Communications (Petition for Special Relief)*,[44] should apply to its present situation. Clearview states that in *Falcon Communications*, the Commission granted a waiver of the cable-television cross-ownership rule upon finding that the number of subscribers actually affected by the overlap involved in the proposed acquisition by the television station of the cable system was small (239 of the 770 cable subscribers were in the overlap area) and the cable system was

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[32] Clearview Petition at 4.
[33] *Id.* at 4 n.7.
[34] *Id.*
[35] Clearview Petition at 5.
[36] Clearview states that if Sammons is permitted to acquire these SMATV systems, Sammons will offer the subscribers currently served by Clearview six additional basic channels at a monthly fee $3.97 higher than Clearview's, free additional outlets compared to Clearview's charge of $4.50 per additional outlet, remote controls at $0.50 compared to Clearview's charge of $1.50, non-addressable converters at $2.00 compared to Clearview's charge of $1.50, and seven premium channels compared to Clearview's four premium channels.
[37] Clearview Supplement at 2-3.
[38] *Id.*
[39] *Id.* at 4-5.
[40] Clearview submitted to the Commission a copy of a letter of intent by Sammons expressing interest in acquiring the systems. *Id.*, Exh. A.
[41] Clearview Petition at 3-4.
[42] Clearview Petition at 4 (citing 47 C.F.R. § 76.501(e)(2)).
[43] Clearview Petition at 6. The cable-television cross-ownership rule, 47 C.F.R. Section 76.501(a), precludes a cable system from carrying the signal of a television station with a Grade B contour that overlaps the cable franchise area if the cable system has an interest in the television station.
[44] 62 F.C.C. 2d 225, 39 RR2d 928 (1977).

in a "dire economic predicament" facing foreclosure, thus endangering cable television service in all of the communities served by the cable system.[45]

18. Clearview states that its own dire financial condition cannot be resolved without a sale of assets, and that Sammons is the only buyer interested in acquiring some of its SMATV properties.[46] Rather than endangering the SMATV service provided by Clearview to its approximately 3400 subscribers, Clearview contends that the public interest would be served by granting the waiver and allowing Sammons to acquire the two Mattix systems where Clearview serves 345 subscribers in competition with Sammons.[47]

19. *Discussion.* The Commission's rules permit a cable operator to construct or acquire SMATV facilities within its franchise area in areas not served by the cable system. Indeed, the Commission expressly stated that "if a cable operator has not wired its entire franchise area, the cross-ownership ban does not prevent the operator from building or acquiring a stand-alone SMATV system.[48] Clearview correctly notes that the Commission did not define "unserved portions of a franchise area" in the context of its analysis of the SMATV-cable cross-ownership rules in the *First Cross-Ownership Report & Order*.[49] However, the Commission's SMATV-cable cross-ownership rules expressly state that the "term area served by a cable system' shall mean any area actually passed by a cable system and which can be connected for a standard connection fee."[50] Moreover, in the discussion of the MMDS-cable cross-ownership rules in the *First Cross-Ownership Report & Order*, the Commission observed that this same definition is provided in the context of the program access provisions and in the Conference Report accompanying the 1992 Cable Act.[51]

20. We need not decide the precise contours of the portion of the franchise area that is served by Sammons, however, for the purpose of resolving Clearview's petition. In its unopposed petition, Clearview states that Sammons would have to lay approximately 4.5 miles of cable plant in order to provide cable service to the three Society Hill facilities. We conclude that, under any possible definition of an area served by cable, Clearview has established that the three SMATV facilities at Society Hill are not in a portion of the franchise area that is served by Sammons, and accordingly, that the cross-ownership restriction does not preclude their acquisition by Sammons.

21. The two SMATV facilities at Mattix, where Clearview and Sammons directly compete, present a more difficult question. As noted above, our waiver authority derives from the provision of both the statute and the Commission's rules that permits the grant of waivers where necessary to ensure that all significant portions of a franchise area are able to obtain multichannel video service. Clearly, permitting Sammons to acquire the SMATV systems where it currently competes with Clearview would not, standing alone, result in the provision of cable service to significant areas that would otherwise not be served.

22. However, based upon the evidence presented by Clearview regarding its financial situation, particularly the apparently imminent foreclosure by Phillips, it appears that denial of the waiver would result in the loss of any available multichannel video programming service to the three Society Hill developments and the Rossmore and Clearbrook developments, which currently are served solely by Clearview. By granting the waiver, we are allowing Clearview to remain in business, which ensures that those parts of franchise areas in which it is the sole provider remain able to obtain multichannel video service. A denial of the waiver would also result in the loss of competitive multichannel video service in the Lawrence Square developments where Clearview competes with Comcast. Accordingly, the policy preference for preserving competition from SMATV systems that underlies the cross-ownership restrictions would be disserved by a denial of Clearview's petition for waiver because such competition would be eliminated by Clearview's demise.

23. The Commission has long recognized that economic realities are often a component of waiver requests. We note that in the context of the television one-to-a-market rules,[52] the Commission looks favorably on waiver requests involving "failed" stations, i.e., stations that have not been operational for a substantial period of time (four months) or that are involved in bankruptcy proceedings.[53] Also, when examining one-to-a-market waiver requests on a case-by-case basis the financial difficulties of the station is one factor the Commission has explicitly noted it will consider.[54] The "failed" station rationale was also employed by the Commission to allow certain radio-UHF television combinations under earlier versions of the Commission's broadcast multiple ownership rules.[55]

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[45] Clearview Petition at 7.

[46] Clearview Petition at 7.

[47] *Id.*

[48] *First Cross-Ownership Report & Order* ¶ 127, 8 FCC Rcd at 6846.

[49] *See First Cross-Ownership Report & Order* ¶ 6, 8 FCC Rcd at 6829.

[50] 47 C.F.R. § 76.501(e)(2)(ii). The term "standard connection fee" is not defined in the statute or in the Commission's rules. However, in *Implementation of § 8 of the 1992 Cable Act (Consumer Protection & Customer Service), First Report & Order* § III.B.3, 8 FCC Rcd 2892, 2905 (MM Docket 92-263 1993), the Commission defined standard installation in the context of customer service standards as installations that are located up to 125 feet from the existing distribution system. 47 C.F.R. § 76.309(c)(2)(i).

[51] *First Cross-Ownership Report & Order* ¶ 103, 8 FCC Rcd 6843; *House Committee on Energy and Commerce*, H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 93 (1992).

[52] 47 C.F.R. § 73.3555. The one-to-a-market rule prohibits the common ownership of commercial radio and television stations in the same market if the 2 mV/m groundwave contour of an AM station or the 1 mV/m contour of an FM station encompassed the entire community of license of a television station or, conversely, if the Grade A contour of a television station encompasses the entire community of license of an AM or FM station.

[53] *Amendment of § 73.3555 of the Commission's Broadcast Multiple Ownership Rules, Second Report & Order* (hereinafter the *"Radio-Television Cross-Ownership Second Report & Order"*) ¶ ¶ 86-89, 4 FCC Rcd 1741, 1752-53, *recon. granted in part and denied in part*, 4 FCC Rcd 6489 (1989).

[54] *Id.* ¶ 90, 4 FCC Rcd at 1753.

[55] *See Amendment of § 73.3555 of the Commission's Broadcast Multiple Ownership Rules, Mem. Opinion & Order* (hereinafter the *"Radio-Television Cross-Ownership Second Recon."*) ¶ 6 n.2, 4 FCC Rcd at 6493 n.2 (1989).

24. Another factor the Commission has looked at in waiver cases in other contexts is the unavailability of alternative buyers. For example, in the context of the Commission's policy regarding television satellite stations, one of the three criteria for entitlement to a presumption that operation of a full power terrestrial broadcast station as a "satellite" (through the retransmission of all or part of the programming of a commonly-owned television broadcast station) will serve the public interest is if "no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station."[56] Under that criteria, a prospective seller must establish its diligence in trying to find a buyer.[57] Similarly, under the case-by-case analysis for waivers of the one-to-a-market rules, information related to whether a station has been offered for sale, but to no avail, will be considered in assessing the financial difficulties of a station.[58]

25. One of the Commission's public interest obligations is to exercise its discretion and expert judgement to assess the costs and benefits of combinations in the same market and carefully weigh and consider requests for waivers of its rules.[59] We recognize that permitting Clearview to sell the two Mattix development SMATV systems to Sammons will reduce competition and limit the diversity of voices available to the public in those two developments. However, the case presented here does not implicate Congress' concerns regarding warehousing of competition or anti-competitive conduct by the franchised cable operator.[60] Moreover, the continued economic viability of Clearview would preserve competition and further diversity in other developments where it operates SMATV systems. Further, upon balancing the equities involved in this case, we believe that if granting the waiver will permit Clearview to remain in business, albeit as a smaller competitor, then the grant would also serve the important policy goal of encouraging and promoting alternative distribution sources of multichannel video programming.

26. Based upon the totality of the evidence presented, we conclude that: (1) the requested waiver will permit the continued uninterrupted offering of multichannel video programming within the SMATV systems in Absecon, Lawrenceville and Cranberry, New Jersey; (2) the requested waiver will ensure that significant portions of the franchise area in Absecon township will obtain multichannel video programming; (3) the Society Hill developments in Absecon township are in an area of Sammons' franchise area that Sammons does not serve; (4) the transaction does not implicate warehousing concerns; (5) Clearview has endeavored to find alternative buyers for the systems; (6) Clearview faces foreclosure and bankruptcy; and (7) a relatively small number of Clearview subscribers will be affected by the loss of competitive offerings of multichannel video programming. Accordingly, we conclude that, under the particular circumstances present in this case, granting Clearview's petition to waive Section 76.501(d) will best serve the public interest and is consistent with our obligations pursuant to Section 613 of the Act.

27. The waiver granted herein applies only to the transaction with Sammons Communications of New Jersey, Inc., and is conditioned upon the operation of the SMATV systems at issue by Sammons Communications of New Jersey, Inc. in accordance with the terms and conditions of its franchise agreement.

28. In view of the foregoing, IT IS ORDERED that, pursuant to 47 C.F.R. § 0.321, the request for waiver of 47 C.F.R. § 76.501(d) IS GRANTED with respect to the proposed transfer of the Clearview SMATV systems at Society Hill, Mattix Forge and Mattix Crossing in Absecon, New Jersey to Sammons Communications of New Jersey, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[56] *Television Satellite Stations (Review of Policy & Rules), Report & Order*, 6 FCC Rcd 4212 (1991).

[57] *Id.* ¶ 20, 6 FCC Rcd at 4215.

[58] *Radio-Television Cross-Ownership Second Report & Order* ¶ 92, 4 FCC Rcd at 1753.

[59] *See e.g., Radio-Television Cross-Ownership Second Recon.* ¶ 26, 4 FCC Rcd at 6492-93. *Cf. WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

[60] By conditioning the waiver upon Sammons operating the SMATV system in accordance with the terms and conditions of its franchise agreement, the potential for anti-competitive conduct is significantly reduced. *See First Cross-Ownership Report & Order* ¶ ¶ 122, 127, 8 FCC Rcd at 6845-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PanAmSat Licensee Corp.

Application for Modification of Authority to Construct, Launch and Operate a Hybrid Separate System International Communications Satellite (PAS-2) — File No. CSS-94-017

Application for Final Authority to Launch and Operate a Hybrid Separate System International Communications Satellite (PAS-2) — File No. CSS-88-003(M)

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: October 20, 1994; Released: October 21, 1994

By the Chief, International Bureau:

I. INTRODUCTION

1. PanAmSat Licensee Corp. (PAS) has filed the above-captioned applications for modification of its authority to construct, launch and operate a hybrid satellite (PAS-2) as part of its separate international communications satellite system, and for final authority to launch and operate PAS-2. The application for modification was placed on public notice on July 13, 1994. No petitions to deny were filed. For the reasons set forth below, the Bureau grants PAS' application to modify its PAS-2 satellite, as well as its request for final authority to launch and operate PAS-2 at the 43^0 West Longitude (W.L.) orbital location.

II. BACKGROUND

2. PAS currently operates a hybrid spacecraft on both C-band (4/6 GHz) and Ku-band (11/14 GHz) frequencies in the Atlantic Ocean Region (AOR) at 45^0 W.L.[1] PAS also is authorized to construct another spacecraft, PAS-2, to serve the AOR.[2] In the *PAS Order* the Commission conditionally authorized PAS to operate its AOR system (consisting of PAS-1 at 45^0 W.L. and PAS-2 at 57^0 W.L.) for service between the United States and South and Latin America.[3] Subsequently, PAS received Commission consent to acquire Cygnus Satellite Corporation (Cygnus), including Cygnus' conditional authorizations to construct and operate two Ku-band satellites, to be located at 43^0 W.L. and 45^0 W.L.[4] In authorizing the proposed transfer of control, the Common Carrier Bureau required that PAS conform its proposed AOR system to the Commission's policy of initially assigning only two orbital positions in a given frequency band.[5] PAS subsequently requested that the Commission terminate its assignment to 57^0 W.L., effective as of the date of consummation of the proposed transfer of control.[6]

3. The Commission accepted PAS' request to terminate the 57^0 W.L. orbital assignment,[7] and directed PAS to clarify its plans for a second space station facility in the AOR.[8] PAS then sought to modify its conditional authorization, proposing to operate PAS-2 as a hybrid (C-band and Ku-band) spacecraft at the 43^0 W.L. orbital slot it acquired from Cygnus.[9] On May 11, 1993, the Commisssion granted PAS' amended application for modi-

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[1] Pan American Satellite Corporation, 101 FCC 2d 1318 (1985) (*PAS Order*). On December 31, 1992, the Common Carrier Bureau consented to the assignment by Alpha Lyracom, d/b/a Pan American Satellite, of its international space station authorizations, including its conditional authorization for PAS-2, to PanAmSat, L.P. (PAS, L.P.) See Alpha Lyracom, d/b/a Pan American Satellite, Alpha Lyracom Space Communications, Inc., Cygnus Satellite Corp., 8 FCC Rcd 376 (Com. Car. Bur. 1992). The assignments were consummated on the same day. *See* Letter, dated December 31, 1992, from Joseph A. Godles, Attorney for PanAmSat, L.P. to Donna R. Searcy, Secretary, Federal Communications Commission. Alpha Lyracom, d/b/a Pan American Satellite filed an amendment to the present application on December 9, 1992, requesting that the name of the applicant be changed to PanAmSat, L.P. See File No. CSS-83-003-(M). On January 28, 1994, the Common Carrier Bureau granted PAS, L.P.'s application for consent to the pro forma assignment of PAS, L.P.'s conditional authorization for PAS-2 to PanAmSat Licensee Corp. See PanAmSat, L.P., 9 FCC Rcd 668 (Com. Car. Bur. 1994). The assignment was consummated on January 31, 1994. See Letter, dated February 1, 1994, from Joseph A. Godles, Attorney for PanAmSat Licensee Corp., to William F. Caton, Acting Secretary, Federal Communications Commission. On February 16, 1994, PAS, L.P. amended its application for modification to reflect this change. See File No. CSS-93-008. Accordingly, the consent contained herein for launch and operation of PAS-2 is granted to PAS Licensee Corp.

[2] In addition, PAS has been authorized to launch and operate PAS-4 in the Pacific Ocean Region (POR), *Pan American Satellite Corporation*, 9 FCC Rcd 1869 (1994), and is authorized to construct PAS-7 in the Indian Ocean Region (IOR), *Pan American Satellite Corporation*, 9 FCC Rcd 1867 (1994).

[3] *See PAS Order*, 101 FCC 2d at 1320, 1336.

[4] *Pan American Satellite Corporation*, 2 FCC Rcd 441 (Com. Car. Bur. 1987).

[5] *Id.* at 442.

[6] *See Pan American Satellite Corporation*, 3 FCC Rcd 677 (1988).

[7] *Id.* at 678. PAS subsequently notified the Commission that its acquisition of Cygnus was consummated on May 6, 1988, thus satisfying the condition to PAS' surrender of the orbital location, and the Commission reaffirmed that PAS' assignment to the 57^0 W.L. orbital location was terminated. *See PanAmSat, L.P.*, 8 FCC Rcd 3905 (1993).

[8] *Pan American Satellite Corporation*, 3 FCC Rcd at 679.

[9] PAS stated that, unlike PAS-1, PAS-2 would be capable of full frequency reuse at both C-band and Ku-band, and that as proposed, PAS-2 would be capable of operating forty-two tran-

fication of its conditional authorization, and temporarily assigned PAS-2 as a hybrid satellite to the 43^0 W.L. orbital location to operate on C-band and Ku-band frequencies.[10]

III. DISCUSSION

A. PAS' Modification Request

4. In its request for modification, PAS proposes to redesign PAS-2 in accordance with certain technical information submitted with the application. PAS states that such technical modifications are due to a design that has evolved as a result of competitive bids to build and test the satellite system that were submitted by various companies. PAS states that in selecting Hughes to construct PAS-2, it has had to change the technical design from that approved in the Commission's authorization to construct PAS-2.

5. In its application, PAS describes various technical changes that do not affect its qualifications under the *Separate Systems* decision. PAS' original application described a hybrid satellite (C-Band and Ku-Band); as modified PAS-2 remains a hybrid satellite system with full frequency reuse, but there are payload changes described in the application. Instead of the proposed eighteen C-Band transponders (twelve 36 MHz and six 72 MHz), there are sixteen C-Band transponders (twelve 54 MHz and four 64 MHz). While PAS' proposal envisioned twenty-four 72 MHZ transponders in Ku-Band, the satellite will have sixteen (twelve 54 MHz and four 64 MHz) Ku-Band transponders. The C-Band frequencies to be used are the same as previously proposed (5.925-6.425 GHz and 3.7-4.2 GHz). The Ku-Band frequencies remain the same for the United States and South America, but have been changed, as reflected in the application, for Europe.[11] The number of beams in the new satellite has decreased, but there is no decrease in coverage area, and the new satellite will also serve Africa. Finally, each solid state power amplifier in C-Band transponders has increased in power from 11 watts to 34 watts, and each Ku-Band traveling wave tube amplifier has increased from 50 watts to 63 watts.

6. The requested modifications do not raise any regulatory issues and have not been challenged. Therefore, the Bureau finds that it is in the public interest to grant PAS' request for modification of its authority to construct, launch and operate PAS-2.

B. PAS' Request for Final Authority

7. In its *Separate Systems* decision,[12] the Commission established certain criteria for considering applications for international satellite systems separate from INTELSAT. In reviewing an application for a separate international system, the Commission determines whether the applicant possesses the requisite legal, financial and technical qualifications, whether the proposal is otherwise consistent with the *Separate Systems* decision, and whether grant of the request would be in the public interest. A conditional authorization will be issued to an applicant that satisfies these standards. Final construction, launch and operating authority, however, is contingent upon fulfillment of certain financial requirements and of U.S. obligations under Article XIV of the INTELSAT Agreement.

8. The Commission has previously determined that PAS possesses the necessary legal qualifications to be a Commission licensee.[13] The Commission also previously determined that, with respect to PAS-2, PAS had satisfied the first stage of the two-stage financial showing as well as the technical requirements established by the Commission in the *Separate Systems* decision.[14] After finding that PAS had satisfied the second stage of the required financial showing, the Commission granted PAS' request for final authority to construct PAS-2 on March 30, 1994.[15] In granting final authority to construct PAS-2, the Commission stated that final authorization for launch and operation of PAS-2 would not be issued unless and until: (1) one or more foreign authorities authorize use of this system and enter into consultation procedures with the United States Party or Signatory under Article XIV(d) of the INTELSAT Agreement to ensure technical compatibility and to avoid significant economic harm; (2) the Department of State informs the Commission that the United States has completed its Article XIV(d) obligations and that the Commission may proceed with final authorization of the proposed system; and (3) the Commission grants final authorization.[16]

9. On May 9, 1994, PAS informed the Commission that the PAS-2 AOR satellite at 43^0 W.L. was successfully consulted pursuant to Article XIV(d) of the INTELSAT Agreement for communications between and among the United States, Luxembourg, and the United Kingdom, and requested that the Commission grant final authority for the launch and operation of the PAS-2 satellite.[17] PAS subsequently corrected its notification to reflect that only communications between the United States and the United Kingdom were consulted.[18]

10. On August 28, 1994, the Commission received notification from the United States Department of State that the United States had fulfilled its obligations to consult with INTELSAT under Article XIV(d) of the INTELSAT Agreement, and that the Commission could proceed with final authorization of the PAS-2 satellite.[19] The consultation

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sponders simultaneously, eighteen transponders at C-band and twenty-four at Ku-band. *See PanAmSat, L.P., supra*, 8 FCC Rcd at 3906.

[10] *Id.*

[11] The proposed Ku-Band frequencies were 14.0-14.5 GHz, 11.45-12.2 GHz, and 12.5-12.75 GHz; the modified Ku-Band frequencies are 14.0-14.5 GHz, 11.7-12.2 GHz, and 12.5-12.75 GHz. Application at Exhibit 3, Technical Summary, page 2.

[12] *See Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046, 1164 (1985).

[13] *See* cases cited in notes 1 and 2. *See also PanAmSat , L.P., supra*, 8 FCC Rcd at 3906.

[14] *Id.*

[15] *Pan American Satellite Corporation*, 9 FCC Rcd 1867 (1994).

[16] *Id.* at 1868.

[17] *See* Letter, dated May 9, 1994, from Joseph A. Godles, Attorney for PanAmSat Licensee Corp., to William F. Caton, Acting Secretary, Federal Communications Commission.

[18] *See* Letter, dated August 31, 1994, from Joseph A. Godles, Attorney for PanAmSat Licensee Corp. to William F. Caton, Acting Secretary, Federal Communications Commission.

[19] *See* Letter, dated August 28, 1994, from Steven W. Lett, Director for Satellite and Cable Policy, Bureau of International Communications and Information Policy, U.S. Department of State, to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission.

covered the PAS-2 satellite at the 317^0 E.L (43^0 W.L.) orbital position, and was limited to service between the United States and the United Kingdom through 2009.[20]

11. On September 28, 1994, the Commission received further notification from the United States Department of State that at its one hundred and second meeting held in Washington D.C. from September 20-23, 1994, the Board of Governors of INTELSAT decided "... to eliminate the requirement for formal association with previously completed Article XIV(d) consultations in those cases in which the planned use falls within the technical and non-technical parameters of the original consultation."[21] Thus, the Article XIV(d) consultation obligations of the United States and all other member countries are considered to be satisfied by the initial consultation provided that use by those countries falls within the parameters of that consultation.[22]

12. The U.S. Department of State further noted that it has been the longstanding practice of the United States to provide to INTELSAT consultation material which "captures the full range of services and technical parameters which would apply for communications with all countries covered by each satellite," and that, consistent with this practice and the Board's decision, "the consultation obligations for systems submitted by the United States are completed during the initial consultation for communications with all areas covered by the satellite(s), unless there is an exception at the time of the consultation."[23] In addition, the U.S. Department of State advised that further associations for systems consulted prior to the one hundred and second Board of Governors meeting are also not required.[24] Thus, Article XIV(d) obligations have been discharged for communications to and from all countries within the coverage areas identified in the initial technical consultation for PAS-2.

IV. CONCLUSION

13. In light of the above considerations, the Bureau finds that PAS has satisfied all of the conditions imposed on its construction permit for PAS-2 and has met each of the criteria established in the *Separate Systems* decision, and that it may proceed with the launch and operation of PAS-2 without any further action by the Commission.

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that the conditions imposed on PAS' construction permit for PAS-2 have been satisfied and PAS may proceed to launch and operate its PAS-2 satellite to provide service between the United States and all countries within the coverage area identified in, and consistent with, the INTELSAT Article XIV(d) consultation completed in March 1994.[25]

15. IT IS FURTHER ORDERED that PAS' application for modification of its authorization to construct, launch and operate PAS-2 IS GRANTED, and PAS is temporarily assigned the orbital location at 43^0 W.L. for operation of PAS-2.

16. IT IS FURTHER ORDERED that PAS may provide through the sale or lease of transponders or space segment capacity on PAS-2: (1) all services not interconnected with the public switched network (including private line services and video and audio transmission services); (2) emergency restoration services; (3) up to 1250 64-kbps equivalent circuits interconnected with the public switched network per satellite for the provision of switched international telecommunications services; and (4) interconnected private line services.[26]

17. IT IS FURTHER ORDERED that the applicant shall file with the Commission copies of any operating agreements it enters into with its foreign correspondents within 30 days of execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

18. IT IS FURTHER ORDERED that the Commission shall retain jurisdiction over the use of all space segment within PAS' system to ensure compliance with the conditions of this authorization and with the Commission's rules, regulations and policies.

19. IT IS FURTHER ORDERED that the temporary assignment of any orbital locations to PAS is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right of the use of the orbit or spectrum. Such a change may be ordered, inter alia, in the event that the national security or the public interest so requires, or to implement any of the objectives or policies set forth in the Commission's Separate Systems order, 101 FCC 2d 1046 (1985). Neither this authorization nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation or partnership holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served thereby.

20. This order is issued pursuant to Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applica-

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[20] *See* BG-100-3, BG-100-15 and BG-100-49.

[21] *See* Letter, dated September 28, 1994, from Steven W. Lett, Director for Satellite and Cable Policy, Bureau of International Communications and Information Policy, U.S. Department of State, to George S. Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* The areas covered by PAS-2 governed by the March 1994 consultation include the United States, Mexico, and countries in Europe, South America, Central America, the Caribbean, and Africa, as set forth in PAS' modified application.

[26] See Permissible Services of U.S. Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT), 7 FCC Rcd 2313 (1992), recon. dismissed, 8 FCC Rcd 5122 (1993); Permissible Services of U.S. Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT), 9 FCC Rcd 347 (1994) (U.S. separate satellite systems may provide up to 1,250 64-kbps equivalent circuits per satellite for the provision of public switched services); Alpha Lyracom, d/b/a Pan American Satellite, 9 FCC Rcd 1282 (1994) (modifying PAS's license to permit interconnected private line circuits over PAS-1).

tions for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Optel Communications, Inc. File No. S-C-L-92-004

Application for a license to land and operate in the United States a submarine cable extending between Canada and the United States

FINAL CABLE LANDING LICENSE

Adopted: October 20, 1994; Released: October 21, 1994

By the Chief, International Bureau:

1. On May 4, 1992, Optel Communications, Inc. ("Optel") filed the above-captioned application for authorization pursuant to the Submarine Cable Landing Act, 47 U.S.C. §§ 34-39, to land and operate a high capacity fiber optic submarine cable system (CANUS-1) extending between the United States and Canada. Optel proposed to operate CANUS-1 as a privately-owned system in which bulk capacity would be either leased or sold to users on a non-tariffed, non-common carrier basis.

2. On March 10, 1993, the Commission granted Optel a conditional license to land and operate CANUS-1 in the United States.[1] The grant of a final cable landing license to Optel was withheld until such time as the Commission found that Optel had demonstrated that U.S. entities had been provided a reasonable opportunity to participate in the planning, manufacture, installation, operation and maintenance of the proposed cable system.

3. On July 26, 1994, Optel filed a Request for a Final Cable Landing License. In its Request, Optel states that it has fulfilled the condition placed upon the grant of a final cable landing license. Specifically, Optel states that it has followed an open procurement process that has allowed U.S. companies to bid for the construction of the undersea cable. Optel further indicates that through this process it has selected AT&T Corp. ("AT&T"), a U.S. entity, as the successful bidder, and has issued AT&T an instruction to proceed. In its letter of September 27, 1994, Optel clarified that the construction contract with AT&T covers the planning, manufacture and installation of the undersea cable.

4. With respect to the operation and maintenance of the CANUS-1 cable, Optel clarified in its September 27, 1994 letter that it intends to enter into an agreement with the Atlantic Cable Maintenance Authority ("ACMA") to provide these services. Optel states that ACMA is the only organization that provides cable operation and maintenance services in the Atlantic region, in which the CANUS-1 cable will be located, and therefore an open procurement process is not possible. Optel further states that several U.S. companies, including AT&T and Sprint, are members of ACMA. Finally, Optel states that U.S.-based, AT&T-owned ships will undertake operation and maintenance responsibilities on behalf of ACMA for the CANUS-1 undersea cable.

5. Upon consideration of Optel's Request for a Final Cable Landing License, and in view of the foregoing, the Bureau finds that Optel has satisfied the condition placed upon the grant of a final cable landing license and hereby GRANTS AND ISSUES under the provisions of the Submarine Cable Landing Act, 47 U.S.C. §§ 34-39, to Optel Communications, Inc. a final license to land and operate a high capacity (2.5 Gbit/s) fiber optic digital transmission submarine cable, extending between Manasquan, New Jersey, United States and Pennant Point, Nova Scotia, Canada. Our finding in this matter does not address, and is unrelated to, the issues raised by AT&T in its Petition for Reconsideration of the Commission's grant of the Conditional Cable Landing License to Optel. The grant of this Final Cable Landing License is without prejudice to, and is expressly subject to, any future action the Commission may take on any issue raised in AT&T's Petition.

6. This license is subject to: (1) the Submarine Cable Landing Act, 47 U.S.C. §§ 34-39; (2) the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-609; (3) subsequent applicable acts; (4) all relevant rules and regulations of the Federal Communications Commission; (5) any treaties or conventions to which the United States of America is or may hereafter become a party; (6) any actions by the Commission or the Congress of the United States of America rescinding, changing, modifying, or amending any rights accruing to any person; and (7) the following conditions:

> (1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensee at its expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;
>
> (2) The Licensee shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;
>
> (3) The Licensee or any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall not acquire or enjoy any right, for the purpose of handling or interchanging traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct

[1] Optel Communications, Inc., S-C-L-92-004, 8 FCC Rcd 2267 (1993), *recon. pending.*

or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons or companies controlling it or controlled by it are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) The Licensee shall maintain no less than a 50 percent ownership interest and voting control share in the proposed cable, including 100 percent ownership in the cable station at Manasquan, New Jersey and in the U.S. land portion of the cable from the station to the U.S. beach joint of the submersible portion of the proposed cable;

(6) The Licensee shall not sell or lease any capacity on CANUS-1 to Teleglobe,[2] its affiliates or any partnerships or joint ventures in which Teleglobe is a participant, unless and until Teleglobe, its affiliates, or partnerships in which Teleglobe is a participant has requested and received prior Commission approval for the sale and lease of any such capacity;

(7) The Licensee shall file a copy of any contract, understanding or agreement, or a summary containing the essential terms, conditions and rates, entered into with Teleglobe, its affiliates, or any partnerships or joint ventures in which Teleglobe is a participant for the sale or lease of any capacity on CANUS-1;

(8) The Licensee shall obtain prior Commission approval for any proposed increase in Teleglobe's level of ownership or participation in the Licensee;

(9) The Licensee shall, by application, obtain Commission approval prior to the sale or transfer to a foreign entity of five percent or more in the aggregate of U.S.-owned and -controlled Optel stock;

(10) This license is subject to future modification which may be determined necessary by the Secretary of State to protect U.S. interests as a result of: (a) the sale or lease of capacity to particular foreign or domestic entities; or (b) contracts awarded to particular foreign or domestic entities for the design, construction, installation, operation, or maintenance of the proposed cable;

(11) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirement specified in Section 2 of the Submarine Cable Landing Act, 47 U.S.C. §§ 34-39, or for failure to comply with the terms of this authorization;

(12) The Licensee shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(13) The terms and conditions upon which this license is given shall be accepted by the Licensee by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

7. IT IS FURTHER ORDERED that Optel's Request for a Final Cable Landing License is GRANTED.

8. IT IS FURTHER ORDERED that the grant of this Final Cable Landing License is without prejudice to, and is expressly subject to, any future action the Commission may take on any issue raised in AT&T's Petition for Reconsideration.

9. Acceptance of this License shall be deemed acceptance of the conditions set forth herein.

10. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Scott Blake Harris
Chief, International Bureau

[2] Teleglobe is the monopoly service provider in Canada responsible for the provision of all international telecommunications services originating or terminating in Canada, except for services between Canada and the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 20, 1994

Released: October 27, 1994

IN REPLY REFER TO:
1800B3-RAB

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1825 - K Street, N.W.
Washington, D.C. 20006

In re: KLIP(FM), Monroe, LA
Application for Assignment
of Construction Permit and
Application for license
BLH-930510KB
BAPH-930601GJ

Dear Counsel:

This letter is in reference to: (i) the above-captioned application for license to cover the outstanding construction permit (BPH-880602NN) of station KLIP(FM); (ii) the above-captioned application to assign the construction permit (BPH-880602NN) of station KLIP(FM), Monroe, Louisiana, from Choctaw Broadcasting Corporation ("Choctaw") to New South Communications, Inc. ("New South"); (iii) the informal objection to the above-captioned license application filed by Congressman Bennie G. Thompson ("the Congressman") on June 10, 1993;[1] (iv) the petition to deny the above-captioned assignment application filed by Phoenix Broadcasting Company ("Phoenix"), licensee of station KYEA(FM), Monroe, Louisiana on July 15, 1993; and (v) related pleadings.[2] For the reasons stated below, we will deny the informal objection and petition to deny and grant the license application. We will defer action on the assignment application pending receipt of further information.

BACKGROUND

The construction permit (BPH-880602NN) for Station KLIP(FM) was issued to Choctaw on August 8, 1991. Choctaw constructed the facilities in accordance with the specifications of BPH-880602NN except that it was forced to mount its antenna lower on the specified tower than originally anticipated. Therefore, KLIP(FM) requested special temporary authority ("STA") to operate with the facilities, as constructed, until permanent authority could be obtained. Because KLIP(FM) was a new unbuilt station seeking to provide new service to the public and because the permittee intended to obtain permanent authority for the facilities constructed, the Commission's Audio Services Division ("ASD") granted KLIP(FM)'s STA request on May 27, 1993. *See Letter to Choctaw Broadcasting Corporation*, reference 1800B3-DJF. On June 7, 1993, KLIP(FM) filed a modification application to permanently authorize the facilities specified in the STA. This application was granted on September 9, 1993.

THE PLEADINGS

Informal objection. In the informal objection, Congressman Thompson notes that "it has come to [his] ... attention that there are serious allegations regarding irregularities with the license" and STA granted to Choctaw and requests that his letter be accepted as a formal request for an investigation by the Commission into assertions of general wrongdoing by station KLIP(FM) and improper approvals granted by the Commission. He also notes that "he was told" that the station's permit was originally granted under the FCC's "minority ownership" policy but, prior to any construction start or equipment purchase, the ownership changed. He alleges that the initial owner of Choctaw, Linda Melton ("Melton"), a white female, "is supposed" to have transferred control to a white maleon July 23, 1993. Congressman Thompson then states that the alleged transferee, along with his brother, apparently owns and operates three other stations licensed in the Monroe, Louisiana market: KJLO(FM), KRVV(FM) and KLMB(AM).[3] Congressman Thompson further notes that "though there is no hard evidence which can be presented at this time it would appear that this purchase and transfer of KLIP(FM) is part of a plan to attempt to put the only race-category minority owned and operated station, licensed to West Monroe (KYEA-FM), out of business." Finally, the Congressman points out several alleged infractions which were "brought to his attention" and notes that should an investigation reveal merit to these allegations, he would anticipate the FCC pursuing correction of the situation to the fullest. He requests that during the period of investigation and pending a finding, the FCC either suspend or revoke the STA.[4]

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[1] A response to Congressman Thompson's objection was filed by counsel for New South on July 23, 1993.

[2] Motions for extension of time to file opposition were filed by Choctaw on July 28, 1993; August 6, 1993; August 25, 1993; an opposition to the petition to deny was filed by Choctaw on September 3, 1993; a request for extension of time to file a reply to opposition was filed by Phoenix on October 8, 1993; a reply to opposition to petition to deny was filed by Phoenix on October 22, 1993; and a supplement and erratum to reply to opposition to petition to deny was filed by Phoenix on October 28, 1993. A letter was also filed by Bob Holladay on February 16, 1994 concerning, *inter alia*, Mr. Holladay's view of Phoenix's motive in filing the petition. A copy of this letter was supplied to the parties on February 24, and Phoenix filed a letter response on April 5, 1994.

[3] The transferee to whom the Congressman refers is Frank E. Holladay, sole owner of New South, Licensee of KLMB and KJLO. Clay Holladay, Holladay's son (not his brother), is licensee of KRVV.

[4] Some of the alleged infractions are: (i) operating with a center of radiation that is 13% closer to the ground than was approved under the construction permit; (ii) overmodulating outside accepted parameters resulting in interference with station KMGC; (iii) operating under STA granted without consideration of the dangers of radiofrequency ("RF") radiation from the proposed

The ASD provided Choctaw a copy of Congressman Thompson's objection on June 23, 1993 and requested a response. In its response to the informal objection, counsel for New South indicates that the Congressman's objection has clearly been filed on behalf of Phoenix, licensee of station KYEA(FM). Counsel argues that Phoenix has violated 47 C.F.R. § 1.1210 of the Commission's Rules by soliciting the Congressman to make a prohibited *ex parte* presentation on its behalf and Phoenix should, at the very least, be admonished for its misconduct, citing *Charles R. Lutz*, 56 FCC 2d 385, 386 (1975).[5] With respect to the Congressman's allegation concerning the minority ownership policy, counsel indicates that it is unfounded. He points out that Choctaw was granted a construction permit pursuant to a global settlement in MM Docket No. 90-346 and that the joint request for approval of agreement in that proceeding was filed on April 17, 1991, well before the August 1, 1991, deadline that would have limited the ability of a successful applicant to "withdraw" integration proposals under the *Ruarch* Policy, citing *Comparative Hearing Process (reconsideration)*, 6 FCC Rcd 3403, 3406, (1991). He further indicates that there is no policy that presently favors the operation of broadcast facilities by women, citing *Lamprecht v. FCC*, 958 F.2d 383 (D.C. Cir. 1992) (Commission's sex-based preference policy violates the Fifth Amendment.) Counsel points out that for these reasons, the proposed transaction is fully in accord with Commission policy.

Counsel also indicates that "it is not surprising" that the Congressman concedes that he has no hard evidence to support his conclusions because his allegations are at odds with the facts. Counsel goes on to address the infractions alleged by the Congressman and notes that the "abuse" the Congressman perceives may arise out of the fact that station KLIP(FM) is operated pursuant to a time brokerage agreement, which was filed in compliance with the Commission's rules. Finally, counsel submits that there has been no transfer of control.

Petition to deny. In its petition to deny, Phoenix alleges that KLIP(FM) was constructed and placed on the air by an absentee owner with the assistance of New South and was operated by New South under the terms of a local marketing agreement ("LMA") in conjunction with New South's other stations. Phoenix alleges that Choctaw and New South have participated in the unauthorized transfer of control of the construction permit because New South has been involved in every aspect of the construction and operation of KLIP(FM). Specifically, it argues that New South has provided the equipment and constructed the station, hired and fired personnel, and been involved in finances to the extent that it has actually paid KLIP(FM)'s expenses, purchased outdoor advertising, and run the station out of its common studios with common personnel.

Phoenix also questions New South's LMA with station KLIP(FM), pointing out that the agreement recites that it was made and entered into April 1, 1993, though the certification that Choctaw maintains control was signed May 19, 1993. Phoenix argues that it is significant that the Holladay family stations in the Monroe market (*see* note 3 *supra)* were operated in the past out of common studios and that New South entered into the LMA with KLIP on April 1, 1993, but did not discontinue the LMA with KRVV(FM) until April 8, 1993. Thus, it points out, even according to their own documents, four stations in the same area were commonly operated for a period of at least one week in violation of the Commission's multiple ownership rules.

Phoenix concludes that Choctaw and New South have participated in an unauthorized transfer of control of the permit and permitting this violation of the rules to continue will completely undermine the statutory requirements of Section 310(d) of the Communications Act. Phoenix further concludes that approval of the assignment application will undermine and frustrate the Commission's efforts to promote and encourage minority ownership of broadcast stations, and sanction a continuing violation of the Commission's multiple ownership rules to the detriment of Phoenix and the public interest. Phoenix therefore requests that the assignment application be denied or designated for evidentiary hearing on these grounds, citing *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

Opposition. In its opposition to the petition to deny, Choctaw indicates that, contrary to Phoenix's protestations, there has been no unauthorized transfer of control. With respect to Phoenix's allegations that New South was involved in the construction and operation of KLIP(FM), Choctaw argues that a review of Phoenix's assertions reveals that Phoenix has failed to demonstrate that New South has been involved in station operations in any impermissible manner. Choctaw indicates that it maintains complete control over station operation, and that in fact the LMA between Choctaw and New South provides that the licensee "has full authority to control the operation of the station." This authority includes absolute discretion to accept or reject programming which Choctaw believes to be contrary to the public interest and to preempt any of New South's programming for programming of greater importance. Further, Choctaw indicates that it may terminate the agreement at any time that it believes that continuation of the Agreement would be contrary to the public interest or otherwise inconsistent with its obligations as an FCC licensee. Choctaw further argues that Phoenix has not demonstrated that New South has failed to abide by the terms of its agreement with Choctaw, and the activities described by Phoenix in its petition to deny do not constitute an

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operation; and (iv) absence of a proper lease to cover the space at 150 meters on the tower which, according to the Congressman, could be construed as a misrepresentation and should constitute grounds for revocation of the STA. Choctaw maintains that these allegations are meritless. *See* note 9 *infra*.

[5] Counsel points out that for purposes of the *ex parte* rules, a proceeding is restricted from the day on which a formal opposition is filed. Section 1.1208(c)(1)(i)(b). On July 15, 1993, Phoenix filed a Petition to Deny the above-referenced assignment application. The "formal opposition" was, therefore, tendered after Mr. Thompson's letter of June 10, 1993. However, Section 1.1208(b)(2) of the Rules proscribes *ex parte* presentations if a person *intends* to file an objection "which would cause the proceeding to become restricted." Counsel notes that "[i]t would surely be unfair not to construe the Congressional letter as prohibited *ex parte* communication since Phoenix, which solicited Mr. Thompson's letter, must have intended to file its Petition to Deny by the time the Congressman wrote to the Commission."

unauthorized transfer of control.[6] Additionally, Choctaw points out that while it is accurate that New South assisted financially in the construction of station KLIP(FM), it did so only with the prior and ongoing approval of Choctaw.[7]

With respect to the contention that New South hired employees for Choctaw, the permittee states that: (i) New South had every right to hire its own employees to make its broadcasts over KLIP successful; (ii) Choctaw employs two employees at KLIP, the Station Manager and Chief Operator; (iii) any employees hired by Bob Holladay, New South's owner, to work for Choctaw were hired only with the prior approval of Choctaw; and (iv) Choctaw has paid all of its employees from its own account except Frederick Gordon, who was paid by New South because Choctaw was not ready to handle its payroll in late April of 1993. Choctaw indicates that it reimbursed New South for all monies advanced.

Finally, Choctaw indicates that, contrary to Phoenix's assertions, Ms. Melton's Arizona residence is irrelevant. Choctaw states that Ms. Melton was represented in Monroe by her business partner and agent, Mr. Frank, as well as her daughter, Julie Frank, and that Mr. Frank has maintained a supervisory role over the station's operations. Choctaw also indicates that, while Ms. Melton had recently returned to Monroe to oversee station operations, she was closely involved in such matters as station format (which changed during the Summer of 1993 only after New South had requested and obtained her consent) even while she was in Arizona.

Reply. In reply, Phoenix states that Choctaw never adequately defines the extent to which New South "assisted" in the construction of KLIP[8] and that Choctaw has not indicated what consideration was paid to New South for its "assistance" in constructing the station and thus has not demonstrated its financial independence from New South. Phoenix concludes that "either the whole relationship between New South and Choctaw is a sham or the Commission is being asked to permit the sale of a bare license for $400,000." *Id*. at 8.

DISCUSSION

Informal objections and Petitions to Deny must, pursuant to Section 309(e) of the Communications Act of 1934, as amended, provide properly supported allegations of fact which, if true, would establish a substantial and material question of fact regarding whether grant of the application in question would be consistent with the public interest, convenience and necessity. *WWOR-TV, Inc.*, 6 FCC Rcd 193, 197 n.10 (1990). Furthermore, in assessing the merits of such pleadings, the staff must use a two-step analysis under Section 309 (d)(1) and (2) of the Communications Act. The first step is whether or not a *prima facie* case has been made. If so, we next consider whether or not there is a substantial and material question of fact to warrant inquiry. Thus, in assessing both the informal objection and the petition to deny, the primary issue is whether or not substantial and material questions of fact have been raised to warrant further action by the Commission.

The informal objection. Congressman Thompson's informal objection against the KLIP-FM license application presents no support for its allegations of impropriety.[9] It therefore will be denied below. *See Area Christian Television, Inc.*, 60 RR 2d 862 (1986). However, we do not believe that Phoenix improperly solicited the assistance of the Congressman in this matter. The Congressman's objection was tendered on June 10, 1993, five days *before* the release of a Commission Public Notice announcing the acceptance of the KLIP assignment application and over one month before Phoenix filed its petition to deny. Additionally, although the Congressman's objection specifically refers to a proposed "purchase and transfer," it also is directed toward the KLIP(FM) license application and the propriety of the STA grant. The timing and substance of Congressman Thompson's objection and Phoenix's petition differ to such an extent that we find it unlikely that Phoenix sought the Congressman's intervention. Rather, we are persuaded by Phoenix's contention that, prior to the filing of the Congressman's objection, it *did not know* or *it could not have known* that it would file a petition to deny the assignment application and therefore did not violate the *ex parte* rules.

Petition to deny, transfer of control allegations. Essentially, Phoenix argues that New South has been involved in every aspect of the construction and operation of KLIP to date, and thus there has been an unauthorized transfer of control warranting designation for an evidentiary hearing.[10]

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[6] Choctaw indicates that: (i) Ms. Melton and her representative and agent, Walter J. Frank, Jr., handled the tower lease negotiations and obtained approval from the tower site owner; (ii) construction of the station was supervised by Roger Bennett, Choctaw's Chief Engineer; and (iii) acquisition of the station's equipment was approved by Mr. Frank.

[7] Choctaw indicates, *inter alia*, that construction was supervised by Choctaw's Chief Engineer, Roger Bennett, and that acquisition of the station's equipment was given prior approval by Ms. Melton's business partner and agent, Walter Frank.

[8] Phoenix points to Mr. Holladay's statement that "New South assisted Choctaw in the construction of KLIP(FM) by acquiring equipment necessary to make the station operable" and points out that the sales contract contains no provision transferring any equipment to New South. Phoenix asks: "Did New South sell the equipment to Choctaw, lease the equipment [to Choctaw], or as the Asset Purchase Agreement suggests, neither?"

[9] A review of the KLIP-FM license application by our engineering staff reveals that the alleged technical infractions contained in the Congressman's objection are without merit. Because station KLIP(FM) was operating under an STA approved by the Commission, no further action is required here. Additionally, we note that the STA was granted properly pursuant to 47 U.S.C. §309(f) and 47 C.F.R. §73.1635, pursuant to which the Commission may authorize operation for up to 180 days at a specified variance from the terms of station operation in cases of "extraordinary circumstances when delay in the institution of the temporary operations would seriously prejudice the public interest." Here, STA was granted in order to permit KLIP(FM) to commence operations and provide a new FM service to the Monroe listening public. Further, we find that the station was in fact operating in compliance with the agency's RF radiation guidelines.

[10] Phoenix's allegation that the instant proposal would violate the Commission's multiple ownership rules is misguided. Holladay Broadcasting of Louisiana, Inc. ("Holladay"), licensee of station KRVV(FM), advised the Commission that the LMA between KRVV(FM) and KLIP(FM) was terminated as of April 8, 1993, the day KLIP(FM) commenced operations. Thus, there was no time when the two stations were simultaneously pro-

Section 310(d) of the Communications Act of 1934, as amended, prohibits the transfer of a construction permit or station license without prior Commission consent. As stated by both parties, although there is no exact formula by which "control" of a broadcast authorization can be determined, the Commission has traditionally looked beyond the legal title to whether there are any actions reflecting a new entity or individual with the right to determine the basic policies and ultimate control of the station. *See WHDH, Inc.*, 17 FCC 2d 856 (1969) *aff'd. sub nom. Greater Boston Television Corp. v. FCC*, 44 F.2d 841 (D.C. Cir. 1970), *cert. denied* 403 U.S. 293 (1971). *See also Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981). The Commission has established certain guidelines in this area, including whether control of the station's finances, its personnel and its programming have shifted to a new entity or individual. Although a permittee or licensee may delegate certain functions to others, it may not abdicate ultimate responsibility to determine the manner or means of operating the station. *See Broadcasting Associates*, 5 FCC Rcd 6584 (1990).[11]

Phoenix's allegations concerning unauthorized transfer of control do not dictate additional inquiry, at least with respect to the LMA. As Choctaw points out, the Agreement provides that the licensee, Choctaw, "has full authority to control the operation of the station" and that this authority includes absolute discretion to accept or reject programming which Choctaw believes to be contrary to the public interest. Furthermore, Choctaw may terminate the Agreement at any time that it believes that continuation of the Agreement would be contrary to the public interest. Petitioner has not shown that New South has exceeded the scope of authority granted in the LMA, which otherwise comports with agreements previously approved by the Commission. *See Roy R. Russo, Esq.*, 5 FCC Rcd 7586 (MMB 1990); *Joseph A. Belisle*, 5 FCC Rcd 7585 (M.M. Bur. 1990).

Phoenix also points to the actual construction of KLIP(FM), arguing that New South was intimately involved in every step of that process. Petitioner does not dispute that all employees and equipment utilized by New South in its operation of KLIP were hired or acquired with Choctaw's "approval," and it is uncontroverted that, with one exception, all payments made to the employees were drawn from Choctaw's account. However, the format change during the Summer of 1993 was instituted only after seeking and receiving Ms. Melton's approval. Further, while the statement of Mr. Barnett of KMGC-FM in Phoenix's Reply indicates that Mr. Barnett was directed to contact Mr. Holladay regarding an interference complaint, it was actually Choctaw's engineer, Roger Bennett, who resolved the problem. These are indicia that New South both recognized and deferred to the authority of Ms. Melton and Choctaw. Thus, we believe that Choctaw is more than merely a "consultant" to New South in operating KLIP(FM). *See Salem Broadcasting, Inc., supra*, 69 FCC 2d at 854. Therefore, we agree with Choctaw that, on the facts currently before us, no substantial and material questions of fact have been presented regarding whether Choctaw, the licensee of station KLIP(FM), failed to retain ultimate control over the operation of its station.[12]

Petition to Deny, "bare license" sale. Additionally, Phoenix raises in its reply a question concerning the assignment which has been neither resolved nor addressed. It concerns the equipment which is utilized in KLIP(FM) operations. The parties agree that New South obtained the equipment and, at least in the case of the antenna, paid for its installation. *See* Exhibit 12 to Petition to Deny, Statement of Cliff Bullock. Phoenix points out that Section 1.1 of the Asset Purchase Agreement submitted with the assignment application indicates that, upon final FCC approval, "Seller will sell, transfer, assign, convey to Buyer the following:

> 1) The FCC Permit; and
>
> 2) all pertinent files, records and documents pertaining to the FCC Permit or the Station."

Phoenix charges that, in the absence of some disposition of equipment or other Choctaw assets, the Commission is here being asked to approve the sale of a "bare license" for $400,000.[13]

While Section 2.8 of the Asset Purchase Agreement ("Ownership of Assets") indicates that Choctaw "has good and marketable title to all of the assets to be conveyed to Buyer pursuant to Section 2.1," neither Section 2.1 of the Asset Purchase Agreement nor any other provision contains a list of those assets.[14] Thus, on May 6, 1994, we requested that Choctaw/New South provide the following information: (i) what equipment, specifically, did New South acquire for KLIP(FM), and who paid for its installation; (ii) what is the status of that equipment now, including, if necessary, a discussion of why it was not mentioned in the sales contract; (iii) what, if any, consideration is or

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grammed by New South, and the proposal considered here complies fully with the requirements promulgated in the *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755 (1992), *recon. granted in part and denied in part*, 7 FCC Rcd 6387 (1992).

[11] We also emphasize, as pointed out in Attachment A to New South's reply, the danger inherent in the presence of a prospective buyer at a radio station on a day-to-day basis, *see Phoenix Broadcasting Co.*, 44 FCC 2d 838, 839 (1973), and *Fine Arts Broadcasting, Inc.*, 57 FCC 2d 108, 111 (1975) ("... prospective purchasers will not be permitted to assume managerial positions at stations they are seeking to acquire unless exceptional and the most compelling circumstances are shown.")

[12] Phoenix has provided several contradictory allegations and affidavits creating some possible factual issues. For example, neither New South nor Choctaw explains why Mr. Walters, New South's engineer, and not Mr. Bennett, Choctaw's engineer, signed the technical portion of KLIP(FM)'s license application. However, it has failed to provide convincing evidence that control has been transferred. *See Broadcast Enterprises, Inc. v. FCC*, 390 F.2d 483, 485 (D.C. Cir. 1968) ("Contrary allegations and affidavits which create some possibly unresolved factual issue do not invariably necessitate an evidentiary hearing before the Commission can judge whether an assignment would be in the public interest).

[13] Choctaw also argues that Phoenix's allegation concerning "the sale of a bare construction permit" apparently has resulted from Phoenix misreading the Commission's Rules (Section 73.3597(c)(2)). Choctaw indicates that the Commission has defined an "unbuilt station" as one at which program tests have not commenced. *See* 47 C.F.R. §73.3597(c)(1)(i). Choctaw points out that it has commenced program tests and in fact filed a license application before the assignment application was filed.

[14] Section 2.1 actually specifies only that Seller is duly and validly organized and incorporated.

has been regularly remitted to New South by Choctaw for use of the equipment or for any other reason; and (iv) if the equipment used in KLIP(FM) operations is not part of the assignment transaction, what specific Choctaw "assets" will accompany the KLIP permit/license?

On May 26, 1994, Choctaw/New South responded, essentially stating that

> both Choctaw and New South understood and intended that the Station, including all related assets, would eventually be sold to New South by Choctaw. The parties also agreed and understood that the equipment was obtained and installed by New South acting on behalf of Choctaw, with an express promise by Choctaw to reimburse New South for its equipment-related costs in the event that the contemplated sale did not occur. Choctaw's consideration for New South's obligation to provide the equipment was its promise to reimburse New South if the sale of the station was not consummated, and was further reflected in the amount New South was to pay for the assets of the Station.

Letter to William F. Caton, Acting Secretary, May 26, 1994, at 3.

From Choctaw/New South's response to our inquiry letter, it is evident that the instant transaction does not involve the sale of a bare license. All equipment used in operating the station, along with the existing tower lease entered into by Choctaw and "Choctaw's rights to intangible assets, Station agreements, customer lists, and all other assets that are part of the Station as an operating business" will be assigned to New South upon consummation of the instant transaction. Thus, precedent does not require that we deny the assignment. *See, e.g., Radio KDAN, Inc.*, 11 FCC 2d at 935, *Edward B. Mulrooney*, 13 FCC 2d at 947 (insufficient "associated resources" transferred with license to operate the stations in question).

FINAL MATTER: UNAUTHORIZED PROFIT

On February 16, 1993, before KLIP commenced operations, Choctaw signed a letter agreement to sell the station to New South for $400,000.[15] On March 31, 1993, Choctaw and New South signed the asset purchase agreement submitted along with the sale application and on April 1, 1993, they signed the LMA, which was to take effect immediately. On April 8, 1993, Choctaw notified the Commission that it had commenced the operation and program testing of station KLIP. The subject license application was filed on May 10, 1993, and the assignment application shortly thereafter on June 1, 1993.

We are concerned that the combination of circumstances involved here contravenes the spirit of the "no-profit" of the remaining "anti-trafficking" provisions in 47 C.F.R. §73.3597(c).[16] Choctaw essentially guaranteed itself a profit on the sale of an unbuilt station by signing the binding agreement to sell KLIP to New South at a fixed price. Our concerns are compounded by the fact that Choctaw will reap a $400,000 reward for the sale of KLIP when, by the parties' own admission, Choctaw ostensibly spent little or nothing to construct, staff, or program the station: all of these activities were done by New South, albeit with enough oversight and consultation with Choctaw that, as indicated above, no premature transfer of control occurred. Further, we are concerned that Choctaw is merely attempting to defer realization of its profit from the sale of KLIP(FM) by filing the assignment application after the station commenced operation. Therefore, while we will approve the sale, we will limit the consideration paid to Choctaw by New South to the legitimate and prudent expenses which Choctaw can document subsequent to the release of this letter.

CONCLUSION

Accordingly, for the reasons set forth above, Congressman Thompson's informal objection and Phoenix's petition to deny ARE DENIED, and license application No. BLH-930510KB IS GRANTED. Additionally, we find that Choctaw and New South are fully qualified to sell and purchase KLIP(FM), respectively. However, action will be withheld on the subject assignment application for a period of 30 days in order for Choctaw to provide detailed itemization and documentation of expenses it incurred in prosecuting its application and in putting the station on the air. Expenses incurred in negotiating the sale or which were reimbursed by New South are not claimable. *See Horseshoe Bay Centex Broadcasting Co.*, 5 FCC Rcd 7125, 7128 (1990). Failure to file the requested information within this time frame will result in our limiting the consideration for this sale to those expenses contained in the KLIP construction permit file, of which we can take official notice.

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[15] The letter also stated that: (i) a formal asset purchase agreement would be prepared promptly; (ii) New South would be permitted to acquire and install the necessary equipment; and (iii) upon commencement of operations, Choctaw would enter into a "lease operation agreement" with New South under which New South would pay $1,000/month Choctaw's expenses for salary and personnel and receive all income from the operation of the station and pay all operating expenses. This agreement was to terminate upon consummation of the sale. Finally, the letter indicated that $150,000 of the purchase price would be for consulting and non-competition agreements entered into by Ms. Melton and New South. These also were effectuated by the March 31 asset purchase agreement.

[16] These provisions restrict the amount of consideration for the sale of an unbuilt broadcast station to the documented "legitimate and prudent expenses" incurred by the seller in prosecuting its application and attempting to put the station on the air. They were retained, while the Commission's other "anti-trafficking" provisions were eliminated, both because they are required by 47 U.S.C. §§ 301 and 304 and because they protect the integrity of the Commission's licensing processes. *Transfer of Broadcast Licenses*, 52 RR 2d 1081, 1089 (1982). The Commission will not issue construction permits to applicants who intend to sell rather than construct their facilities and render a broadcast service, *see Scott & Davis Enterprises, Inc.*, FCC 83-442 (released September 27, 1993), and the "no profit" restrictions of Section 73.3597 act to maintain the integrity of the licensing process by making sales of broadcast construction permits less desirable.

Sincerely,

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

cc: Honorable Bennie G. Thompson
Bruce A. Eisen, Esq.
Marjorie R. Esman, Esq.
Lee J. Peltzman, Esq.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 27, 1994

CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS PUBLIC COMMENTS INVITED

Several local exchange carriers proposed revisions to their cost allocation manuals (CAMs) for the separation of regulated and nonregulated costs for the quarter ended September 30, 1994. Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

Ameritech	AAD 94-127
Bell Atlantic	AAD 94-128
BellSouth	AAD 94-129
Cincinnati Bell Telephone Company	AAD 94-130
Citizens Utilities	AAD 94-131
GTE	AAD 94-132
Lincoln Telephone	AAD 94-133
Nevada Bell	AAD 94-134
NYNEX Telephone Companies	AAD 94-135
Pacific Bell	AAD 94-136
Puerto Rico Telephone Company	AAD 94-137
Rochester Telephone	AAD 94-138
Southern New England Telephone Company	AAD 94-139
Southwestern Bell	AAD 94-140
United Telephone/Central Telephone Company	AAD 94-141
U S West, Inc.	AAD 94-142

The following company filed a letter stating there were no changes to its CAM for the quarter ended September 30, 1994.

AT&T	AAD 94-126
Neca	AAD 94-143

Parties may file comments on the proposed revisions to the CAMs no later than **November 21, 1994**. Replies should be filed by **December 26, 1994**. Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L St., N.W., Suite 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan at (202) 418-0800.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — File No. I-T-C-94-109

Application for Authorization under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Additional Capacity in the G-P-T Cable System, and to Lease Capacity in the HAW-4/TPC-3 Cable System to its Correspondent Carrier in the Philippines, for the Provision of its Authorized Services between the United States and the Philippines

ORDER AND AUTHORIZATION

Adopted: October 20, 1994; Released: October 28, 1994

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application filed by American Telephone and Telegraph Company ("AT&T") pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require the authorization of AT&T to lease capacity in the HAW-4/TPC-3 Cable System[1] to Philippine Global Communications, Inc. ("Philcom"), AT&T's new correspondent in the Philippines, and to acquire and operate additional capacity in the G-P-T Cable System[2] for the provision of AT&T's authorized services between the United States and the Philippines.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-109 IS GRANTED and AT&T is authorized to:

a. acquire, by lease or on an Indefeasible Right of User ("IRU") basis, and operate half-interests in up to thirty (30) MAUOs[3] of capacity in the Guam-Philippines segment of the G-P-T Cable System;[4]

b. acquire by lease or other comparable means such extension facilities as may be needed to extend the capacity to be acquired in the G-P-T Cable System;

c. activate capacity in the G-P-T Cable System and in the aforementioned extension facilities for the provision of its authorized services between the United States and the Philippines; and

d. lease half-interests in thirty (30) MAUOs of capacity in the HAW-4/TPC-3 Cable System to Philcom, its correspondent in the Philippines.

3. This Order is issued pursuant to Section 0.261 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section of 1.115 of the Commission's rules may be filed within 30 days of public notice of this Order. (*See* 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] The HAW-4/TPC-3 Cable System extends among landing points at Point Arena, California; Oahu, Hawaii; Tanguisson, Guam; and Chikura, Japan. AT&T has been authorized to construct, acquire, and operate capacity in the HAW-4/TPC-3 Cable System. *See HAW-4/TPC-3 Section 214 Authorization*, File No. I-T-C-85-219 (released Jan. 7, 1986); *AT&T - HAW-4/TPC-3*, 4 FCC Rcd 7161 (1989).

[2] The G-P-T Cable System extends between landing points at cable stations at Luzon, the Philippines; Tanguisson, Guam; and Fangshan, Taiwan. AT&T has previously been authorized to construct, acquire and operate capacity in the G-P-T Cable System. *See American Telephone & Telegraph Co.*, 3 FCC Rcd 5091 (1988).

[3] AT&T will pay an estimated unit cost of $195.00, per half-interest in each Minimum Assignable Unit of Ownership (MAUO), on a monthly lease basis, plus an estimated unit cost of $19.50 per half-interest, on a monthly lease basis, in each MAUO for cable station costs for such interests in the G-P-T Cable System. *See* Letter from Michael Donnella, Senior Attorney, AT&T to George S. Li, Chief, International Facilities Division, Common Carrier Bureau (dated July 8, 1994). A MAUO is defined as a 64-kilobit per second circuit equivalent.

[4] AT&T will be using the acquired facilities in the G-P-T Cable System for the exchange of jointly provided services with Philcom between the United States and the Philippines. Specifically, the G-P-T acquisition is an extension of an overall network of authorized facilities that have previously been acquired on an IRU or ownership basis. The acquisition of capacity in the G-P-T Cable System will extend and connect AT&T's existing authorized facilities by providing an alternate route to provide connectivity to countries that AT&T is currently authorized to serve.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MFS International, Inc. File No. I-T-C-94-246

Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to provide authorized international common carrier direct services between the United States and Europe, utilizing the PTAT, TAT-8, TAT-9, TAT-10, TAT-11, and Germany-Denmark 1 Submarine Cable Systems; to provide, through the use of authorized capacity and transit arrangements, indirect service between the United States and Europe; and to provide authorized international common carrier direct services between the United States and foreign points utilizing the INTELSAT satellite system

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 20, 1994; Released: October 28, 1994

By the Chief, Telecommunications Division:

1. The above-captioned uncontested application[1] filed, pursuant to Section 214 of the Communications Act of 1934, as amended (the Act), by MFS International, Inc (MFSI),[2] requests authority to acquire and operate capacity on an Indefeasible Right of User (IRU) basis in the PTAT-1, TAT-8, TAT-9, TAT-10, TAT-11 and the Germany-Denmark cable systems for the provision of direct switched and private line services between the United States and each of the following international points: United Kingdom, Ireland, France, Germany, Belgium, Sweden, and the Netherlands.[3]

2. MFSI also requests authority to (i) use the above-mentioned facilities for service to the international locations specified in Attachment B through transiting arrangements with MFSI's foreign correspondents; (ii) acquire by lease and operate such facilities as may be necessary to extend capacity in the cable systems and to link the U.S. cable landing stations to MFSI's technical operations center in Jersey City, New Jersey; (iii) establish and operate channels of communication on INTELSAT's Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of IBS and International Television Services (data, voice, video, audio and television services) between the United States and the international points listed in Attachment C; and (iv) provide transborder services (video and business services) using domestic satellites and the Canadian ANIK satellite system.[4] Upon consideration of MFSI's uncontested application, pursuant to Section 214 of the Act, we certify that the present and future public convenience and necessity require its grant.

3. Accordingly, IT IS ORDERED that application File I-T-C-94-246 IS GRANTED and MFSI is authorized to:

(i) acquire, on an IRU basis, and operate a one-half interest in up to two (2) DS-3s in the PTAT-1 cable system, up to one (1) DS-3 in each of the TAT-8, TAT-9, TAT-10, and TAT-11 cable systems, and up to two (2) DS-3s in the Germany-Denmark cable system;

(ii) acquire by lease and operate such facilities as may be necessary to extend capacity in cable systems and to link the U.S. cable landing stations to MFSI's technical operations center in Jersey Center, New Jersey;

(iii) use the authorized capacity to provide direct switched and private line services between the United States and the United Kingdom, Ireland, France, Germany, Belgium, Sweden and the Netherlands;

(iv) use the authorized capacity for transit arrangements for indirect service between the United States and the international points listed in Attachment B;

(v) lease and operate channels of communication on INTELSAT AOR and POR satellites for the provision of IBS, International Television Services (data, voice, video, audio and television services) between the United States and the international points listed in Comsat FCC Tariff No. 103, and for the provision of

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[1] Although AT&T filed on May 6, 1994 a petition to deny in part this application, MFSI and AT&T subsequently filed a joint statement through which AT&T withdrew its opposition. In the joint statement, AT&T stated that it had no objection to the grant of MFSI's application in light of MFSI's clarification that MFSI does not intend to resell private lines, but rather to provide private lines which may be interconnected to the public switched networks. *See* Joint Statement of AT&T Corp. and MFSI to George Li, Chief, International Facilities Division, Common Carrier Bureau (dated May 25, 1994). We, therefore, consider this application to be uncontested.

[2] MFSI is a Delaware corporation that is a wholly-owned subsidiary of MFS Communications Company, Inc. MFSI is regulated as a non-dominant international carrier. *See* MFSI Section 214 Authorization, 9 FCC Rcd 2275 (1994).

[3] MFSI intends to utilize connecting facilities from cable landing stations to Belgium and Sweden through agreements with its correspondents.

[4] MFSI intends to provide TV reception, occasional point-to-point video services, business services, including data and electronic document distribution, video teleconferencing and voice communications. MFSI proposes using the Canadian ANIK satellite system which currently consists of ANIK B, C1, C2, C3, D1, D2, E-A and E-B and all U.S. domestic satellites for which INTELSAT Article XIV(d) consultation has been completed successfully, and FCC authorization has been granted.

international switched and private line services between the United States and the international points listed in Attachment C; and

(vi) provide transborder services (including video, data and business services) using U.S. domestic satellites and Canadian ANIK satellite system consistent with existing consultations under Article XIV(d) of the INTELSAT Agreement.

4. IT IS FURTHER ORDERED that neither MFSI nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MFSI or any such persons or companies controlling or controlled by MFSI are parties.

5. IT IS FURTHER ORDERED that our authorization of MFSI to provide private lines is limited to the provision of such private lines only between the United States and each of those points listed in the appendices -- that is, private lines which originate in the United States and terminate in one of the points listed in the appendices, or which originate in one of the points listed in the appendices and terminate in the United States. In addition, MFSI may not -- and MFSI's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched or interconnected private line services, unless authorized to do so by the Commission upon a country specific finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II First Report and Order, 7 FCC Rcd 559 (1991), *Order on reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd. 7927 (1992), *petition for reconsideration pending*.

6. IT IS FURTHER ORDERED that MFSI shall file semi-annual reports of circuits additions pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b) for the INTELSAT and common carrier cable capacity authorized herein.

7. IT IS FURTHER ORDERED that MFSI shall obtain prior authority pursuant to Section 214 of the Communications Act, 47 U.S.C. §214, before adding any circuits or channels of communication for the provision of service over the PTAT-1 cable system or any non-common carrier facility.

8. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license for the PTAT-1 cable system issued herein under the Act entitled "An Act relating to the landing and operation of submarine cables in the United States." 47 U.S.C. §§ 34-39.

9. IT IS FURTHER ORDERED that MFSI shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

10. IT IS FURTHER ORDERED that MFSI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

11. IT IS FURTHER ORDERED that MFSI shall file copies of any operating agreements entered into with foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51(a) of our Rules, 47 C.F.R. §43.51.

12. IT IS FURTHER ORDERED that this Order may be subject to future modification pursuant to the outcome of the *Phase II Third Further Notice* and any related proceedings.

13. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this Order (*see* Section §§1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Attachment A[5]

Cable System	Capacity	Countries
PTAT-1	2 DS-3	U.K., Ireland
TAT-8	1 DS-3	U.K., France
TAT-9	1 DS-3	U.K., France
TAT-10	1 DS-3	Germany, Netherlands
TAT-11	1 DS-3	U.K., France
Germany-Denmark 1	2 DS-3	Germany, Denmark

[5] MFSI has stated that the initial utilization of the herein authorized circuits will be 3 E-1 circuits each to the United Kingdom and Ireland on PTAT-1. With respect to the capacity requested in the TAT-8, TAT-9, and TAT-11 cables, MFSI anticipates using six E-1 circuits to the United Kingdom and three E-1 circuits to France, but is uncertain as to which cables will be utilized for which circuits. With respect to the requested capacity on TAT-10, MFSI anticipates splitting the capacity between Germany and the Netherlands, with two E-1s of the cable's capacity being used for service to Germany and one E-1 being used for service to the Netherlands. Each DS-3 is equivalent to 630 voice grade circuits (before multiplexing). *See* Letter from Helen Disenhaus, Esq., Counsel for MFSI to Jennifer A. Warren, Esq., Common Carrier Bureau (dated July 25, 1994).

Attachment B

COUNTRIES FOR WHICH TRANSITING AUTHORITY IS REQUESTED

Austria
Belgium
Denmark
Finland
France
Germany
Ireland
Italy
Netherlands
Norway
Portugal
Spain
Sweden
Switzerland
United Kingdom

Attachment C

Countries For Section 214 INTELSAT Switched and Private Line Authority

Country	No. of Circuits
Argentina	2 DS-3
Armenia	2 DS-3
Austria	2 DS-3
Australia	2 DS-3
Azerbiajan	2 DS-3
Bahamas	2 DS-3
Belgium	2 DS-3
Bermuda	2 DS-3
Brazil	2 DS-3
Byelarus	2 DS-3
Canada	2 DS-3
Chile	2 DS-3
China, People's Republic	2 DS-3
Denmark	2 DS-3
Ecuador	2 DS-3
Egypt	2 DS-3
Estonia	2 DS-3
France	2 DS-3
Georgia	2 DS-3
Germany	2 DS-3
Ghana	2 DS-3
Greece	2 DS-3
Hong Kong	2 DS-3
India	2 DS-3
Indonesia	2 DS-3
Ireland	2 DS-3
Israel	2 DS-3
Italy	2 DS-3
Japan	2 DS-3
Kazakhstan	2 DS-3
Kenya	2 DS-3
Korea	2 DS-3
Kyrgycstan	2 DS-3
Latvia	2 DS-3
Liechtenstein	2 DS-3
Lithuania	2 DS-3
Mexico	2 DS-3
Moldova	2 DS-3
Netherlands	2 DS-3
New Zealand	2 DS-3
Norway	2 DS-3
Panama	2 DS-3
Peru	2 DS-3
Philippines	2 DS-3
Poland	2 DS-3
Portugal	2 DS-3
Romania	2 DS-3
Russia	2 DS-3
Saudi Arabia	2 DS-3
Singapore	2 DS-3
South Africa	2 DS-3
Spain	2 DS-3
Sweden	2 DS-3
Switzerland	2 DS-3
Taiwan	2 DS-3
Tajikistan	2 DS-3
Thailand	2 DS-3
Turkmenistan	2 DS-3
Ukraine	2 DS-3
United Kingdom	2 DS-3
Uzbekistan	2 DS-3
Venezuela	2 DS-3
Yugoslavia	2 DS-3
Zaire	2 DS-3

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MicroNet, Inc., File Nos. ITC-94-293
Assignor, CSG-94-133-AL

and

Communications Licenses Limited
Liability Company
Assignee.

Applications for authority, pursuant to
Sections 214 and 310 of the
Communications Act of 1934, as
amended, to receive a Section 214
certificate and assign an
international satellite earth station license

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 20, 1994; Released: October 28, 1994

By the Chief, Telecommunications Division:

I. INTRODUCTION

1. MicroNet, Inc. ("MicroNet") and Communications Licenses Limited Liability Company ("CLLLC") (collectively "the Applicants"), pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules, filed the above-captioned applications. The Applicants request authority to assign from MicroNet to CLLLC, an international satellite earth station license, call sign: KA-331, File No. CSG-92-085-P/L, located in Steele Valley (Perris), California ("Steele Valley Earth Station"). Additionally, CLLLC requests the Commission to grant it blanket Section 214 authority to establish channels of communication between this earth station or any appropriately licensed earth station in the United States and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites in order to provide INTELSAT Business Services ("IBS") and international television transmission and reception services ("ITS") on a common carrier basis. These applications were placed on public notice and no comments were received.

II. BACKGROUND

2. MicroNet is a Delaware corporation. Pursuant to Section 214 (File No. I-T-C 92-171, granted July 22, 1992), MicroNet is authorized to provide ITS from its Steele Valley international satellite earth station. CLLLC is a Colorado limited liability company. CLLLC is not currently providing communications services. CLLLC seeks authority to acquire control of the Steele Valley Earth Station and receive a blanket Section 214 authorization to provide both ITS and IBS between the Steele Valley Earth Station, or any other earth station that may be licensed to CLLLC in the future, and the INTELSAT AOR and POR satellites.

3. In its application, CLLLC states that it is not an alien, a representative of an alien, or a corporation organized under the laws of a foreign government. Additionally, CLLLC states that it does not have any aliens as officers or directors, and its capital stock is owned by two Colorado companies: 80% by IntelCom Employees Trust ("Trust") and 20% by IntelCom Group (U.S.A.) Inc. ("ICG").[1]

III. DISCUSSION

4. CLLLC requests a blanket Section 214 certificate and CLLLC and MicroNet request consent to assign the Steele Valley international satellite earth station license from MicroNet to CLLLC. Applicants state that granting the application will serve the public interest by: (1) enabling CLLLC to provide high quality international communication services to its United States customers; (2) increasing competition in domestic and international communications markets; (3) permitting other international carriers besides COMSAT to own and operate earth stations that provide IBS and ITS; and (4) furthering the Commission's policy to introduce IBS and ITS in the United States as soon as possible.

5. We find that granting CLLLC's request for the assignment of the Steele Valley Earth Station license from MicroNet to CLLLC will serve the public interest, convenience and necessity. Similarly, we find that granting CLLLC's request for a Section 214 authorization to provide

[1] The Trust is organized under Colorado law, administered by an independent trustee (initially the Bank of Denver) a Colorado corporation, and has only United States citizens as beneficiaries. The Trust's principal business is ownership of CLLLC and distribution of profits to its beneficiaries who are ICG employees and subsidiaries. ICG, the 20% owner of CLLLC, provides telecommunications services such as competitive access, network systems integration, and satellite services. ICG will purchase common carrier satellite services from CLLLC at non-discriminatory rates based on CLLLC's costs and a reasonable rate of return in accordance with the Communications Act and the Commission's regulations governing the furnishing of common carrier services by non-dominant carriers.

Although ICG is owned by a Canadian corporation, and three out of five directors are aliens, ICG owns only 20% of CLLLC and therefore does not directly or indirectly control CLLLC in violation of Section 310 of the Communications Act of 1934, as amended. Section 310(b)(4) of the Communications Act of 1934, as amended, prohibits the grant of a common carrier license to - "[a]ny corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license."

IBS and ITS between appropriately licensed earth stations and INTELSAT AOR and POR satellites will serve the public interest, convenience and necessity. However, Steele Valley Earth Station's license authorizes the provision of ITS but not IBS. Consequently, CLLLC cannot provide IBS from this earth station without first modifying the Title III license to include authorization for IBS. Thus, we will grant CLLLC's request for blanket Section 214 authority to provide both ITS and IBS from appropriately licensed earth stations and condition CLLLC's providing IBS from the Steele Valley Earth Station on CLLLC obtaining from the Commission a modification to the earth station's Title III license to include IBS.

IV. ORDERING CLAUSES

6. IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require CLLLC to provide ITS and IBS from appropriately licensed earth stations.

7. Accordingly, IT IS ORDERED, pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§214, 310(d) and Section 63.01 of the Commission's Rules, 47 C.F.R. §63.01, that the applications of MicroNet, Inc., and Communications Licenses Limited Liability Company, File Nos. ITC-94-293; and CSG-94-133-AL, ARE GRANTED and we consent to the assignment from MicroNet to CLLLC of the Title III license referenced in paragraph 1, and we grant Section 214 Authorization to CLLLC to provide ITS and IBS from appropriately licensed earth stations. This grant, however, limits CLLLC to providing only ITS from the Steele Valley Earth Station until CLLLC obtains Commission authority to provide IBS from the Steele Valley Earth Station.

8. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that CLLLC must file tariffs for the services authorized in this order.

9. IT IS FURTHER ORDERED that CLLLC must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

10. IT IS FURTHER ORDERED that this authorization is not to be construed as permitting the provision of any services between earth stations located within the United States.

11. This order is issued under Section 0.261 of the Commission's Rules, 47 C.F.R. §0.261, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. §1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

TTT West Coast, Inc.

For Declaratory Ruling

STAFF RULING

Adopted: October 24, 1994; Released: October 28, 1994

By the Chief, Political Programming Branch:

1. The Commission has before it a request for a declaratory ruling filed by TTT West Coast, Inc. ("TTT"). TTT seeks a Commission determination that appearances by legally qualified candidates for public office on its program *EXTRA -- The Entertainment Magazine* (hereinafter "*EXTRA*") are exempt from the "equal opportunities" requirement of Section 315 of the Communications Act (47 U.S.C. Section 315), under the "bona fide newscast" exemption (47 U.S.C. Section 315(a)(1)).

2. TTT states that *EXTRA* covers news events related to the entertainment industry in a standard newscast format, with anchors, reporters, and a reliance on videotape to provide visual coverage accompanying the reports. According to TTT, *EXTRA* has been regularly scheduled for broadcast six times weekly since September 5, 1994, with five one-half hour programs airing Monday through Friday and a one hour episode airing on the weekend. TTT explains that because *EXTRA* covers a wide range of topical events and issues pertaining to the entertainment industry and the people in it," the program may on occasion air stories in which legally qualified candidates for public office appear. TTT maintains, however, that the subjects and stories covered on *EXTRA* are selected solely on the basis of newsworthiness and public significance rather than with an intent to advance or harm the candidacy of any particular individual.

DISCUSSION

3. Section 315(a) of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to use a broadcast station, it must afford equal opportunities to other such candidates for that office. In 1959, Congress amended Section 315 to exempt from equal opportunities appearances by legally qualified candidates on the following programs:

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a)(1-4). Congress removed the inhibiting effect of the equal opportunities obligation upon bona fide news programming to encourage increased news coverage of political campaign activity. Rather than define precisely what it meant by "news," Congress chose to leave the task of interpreting the scope of each exemption to the Commission. *See* 105 Cong. Rec. 16227 (1959) (Rep. Celler); 105 Cong. Rec. 14455 (1959) (Sen. Pastore).

4. The Commission has ruled on several occasions that specific programs could be treated as bona fide newscasts.[1] In ruling that "Entertainment Tonight" and "Entertainment This Week" were bona fide newscasts, the Commission through its Mass Media Bureau, stated that, in terms of format, the principal consideration should be "whether the program reports news of some area of current events . . . in a manner similar to more traditional newscasts."[2] The Commission has thus declined to evaluate the relative quality or significance of the topics and stories selected for newscast coverage, relying instead on the broadcaster's good faith news judgment. As with the specific programs previously considered exempt under the newscast exemption, *EXTRA* appears to follow a traditional newscast format. Further, we have no basis for believing that the stories covered in *EXTRA* are selected for any reason other than their genuine newsworthiness. Therefore, *EXTRA* in the format described by TTT in its request, appears to satisfy the criteria established for a newscast exemption.

5. In view of the foregoing considerations and based on the information before the Commission, we believe that appearances by legally qualified candidates for public office on *EXTRA* should be accorded the bona fide newscast exemption from the equal opportunities provision of Section 315. Accordingly, TTT's request IS GRANTED.

6. Staff action is taken pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross
Chief, Political
Programming Branch
Enforcement Division
Mass Media Bureau

[1] *Paramount Communications, Inc.*, 5 Fcc Rcd 4627 (1990) ("Hard Copy"); *Paramount Pictures Corp.*, 64 RR 2d 600 (M.M. Bur. 1988) ("Entertainment Tonight" and "Entertainment This Week").

[2] 64 RR 2d at 601.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Applications of OneComm Corporation, N.A. and C-Call Corp. for Transfer of Control to Nextel Communications, Inc.

ORDER

Adopted: October 21, 1994; Released: October 21, 1994

By the Chief, Private Radio Bureau:

1. On October 18, 1994, Kentec Communications, Inc., James A. Kay, Jr., Ron Zahller d/b/a Z Comm, and Pro-Tec Mobile Communications, Inc. (collectively, "the Parties") filed a Motion For Extension Of Time regarding the time for filing Comments and Reply Comments in the above-entitled proceeding.[1] The Parties request that the Commission issue an order extending the filing period for Comments from October 18, 1994 to November 1, 1994.

2. The Parties assert that they were unable to obtain copies of the relevant OneComm licenses from the Private Radio Bureau until Monday, October 17, 1994. As a result, the Parties contend that they were unable to review and analyze the materials and prepare any meaningful comment before the October 18 due date. Therefore, the Parties request an extension of ten business days to file comments.

3. The above-captioned applications for transfer of control were made available to the public on the date the *Public Notice* was released, Monday, October 3, 1994, in the Rules Branch of the Private Radio Bureau in Washington, D.C. On Wednesday, October 5, 1994, the applications were available for duplication at International Transcription Services ("ITS") located at 1919 M Street, Room 246, Washington, D.C. The affected OneComm licenses were made available on Thursday, October 13, 1994 at ITS's office in Gettysburg, Pennsylvania. We therefore believe that these materials were available in sufficient time to enable the Parties to prepare comments in this proceeding.

4. We also note that the motion for extension of time was not filed until October 18, 1994, the date the comments were due. Section 1.46(b) of the Commission's Rules, 47 C.F.R. §1.46(b), requires that motions for extension of time to be filed at least seven days before the filing date, except in an emergency situation. We do not believe such a situation exists here and therefore regard the motion as untimely.

5. We find that the public interest would not be served by granting an extension of the comment period. Accordingly, IT IS ORDERED, pursuant to Section 1.46 of the Commission's Rules, 47 C.F.R. §1.46, that the motion for extension of time is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Private Radio Bureau

[1] *Public Notice*, DA 94-1087, released October 3, 1994 (Notice).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-102

In the Matter of

Revision of the Commission's rules to ensure compatibility with enhanced 911 emergency calling systems — RM-8143

NOTICE OF PROPOSED RULE MAKING

Adopted: September 19, 1994; Released: October 19, 1994

By the Commission:

Comment Date: January 9, 1995
Reply Comment Date: February 8, 1995

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I. INTRODUCTION

1. In this proceeding, the Commission proposes to amend its regulations to address issues raised by the provision of 911 and enhanced 911 services through certain telecommunications technologies. The primary objective of this proceeding is to ensure broad availability of 911 and enhanced 911 services to users of the public switched telephone network (PSTN) whose health and safety may depend on 911 emergency services systems. Toward this end, we intend to ensure that the effective operation of 911 services is not compromised by new developments in telecommunications. First, we address a petition filed by the Adcomm Engineering Company ("Adcomm") to amend Part 68 of the rules by proposing technical performance requirements that ensure the compatibility of private branch exchanges (PBXs) with enhanced 911 emergency services.[1] In this *Notice of Proposed Rulemaking*, we seek comment on proposals for ensuring the compatibility of private branch exchanges (PBXs) and other dispersed private telephone systems with enhanced 911 emergency services.

[1] Comments were filed by Associated Public-Safety Communications Officers, Inc. (APCO), Bell Atlantic, BellSouth, GTE, South Carolina Budget and Control Board, and the Telecommunications Industry Association (TIA), and reply comments were filed by Adcomm and the North American Telecommunications Association (NATA).

2. Second, we propose to adopt rules that would require wireless services, in particular commercial mobile radio services (CMRS)[2] that provide real time voice services, to include features that will make enhanced 911 services available to mobile radio callers. These features include Station Number Identification (SNI), Automatic Location Information (ALI), Selective Routing (SR), and other features for 911 calls provided over wireless mobile units. This action responds to a Petition for Reconsideration filed by the Texas Advisory Commission on State Emergency Communications (TX-ACSEC) under the Office of the Attorney General for the state of Texas.[3] It also responds to the issues raised in the Emergency Access Position Paper filed recently by the Associated Public Safety Communications Officials-International, Inc. (APCO), the National Emergency Number Association (NENA), the National Association of State Nine One One Administrators (NASNA), and the Personal Communications Industry Association (PCIA).[4]

II. BACKGROUND

3. Since AT&T's announcement in 1965 that the digits 9-1-1 would be made available nationally as an emergency telephone number, the use of 911 for emergency purposes has become widespread. The Commission's Network Reliability Council, in performing a special study of the reliability of 911 services, found that "the American public depends on 911 services in its emergencies."[5] The Council found that 89 percent of the wireline access lines in the United States are served by some form of 911 service and that the service is increasingly engineered to provide a high level of reliability.[6] Currently, about 260,000 calls nationwide are placed to 911 every day.

4. 911 emergency services enable telephone users to receive, and state and local governments to provide, fast response to emergency situations. The ability to dial 911 offers several advantages to users. First, it is a single, nationally used three-digit number that is easy to remember and dial in emergency situations. This provides callers, including children, with easy access to emergency services in areas where the telephone number for the various emergency service providers is not readily known. Second, because 911 calls are sent to Public Safety Answering Points (PSAPs) over dedicated telephone lines, these calls are recognized and answered as emergency calls by professionals trained to assist callers in need of emergency assistance. Third, the use of 911 shortens the response time to requests for assistance because PSAP professionals have ready access to police, fire, and health emergency response service providers.

5. There are different levels of 911 services available, depending on the location. Basic 911 service is a forwarding arrangement in which calls dialed to the 911 telephone number are translated at a telephone company switch and are transmitted to a public safety agency for response. Most emergency systems, however, have enhanced this service.

6. Enhanced 911 systems help emergency services personnel achieve the shortest possible emergency response time by using Automatic Number Identification (ANI)[7] to route an emergency call to the PSAP nearest the caller's location. At a minimum, enhanced 911 service provides the PSAP with the ANI of the calling party, permitting the PSAP to call back in the event the call is disconnected. A fully enhanced 911 system not only displays the ANI, but also permits an attendant at the PSAP to identify the calling party's address through the use of an external Automatic Location Identification (ALI) database. The ALI feature also permits selective routing (SR) of the call to the appropriate PSAP for the identified location and displays the public safety agencies (fire, police and emergency medical services) covering that location on the PSAP terminal.[8] A fully enhanced 911 system may also provide the PSAP with other information, including the name of the subscriber, city, zip code, telephone number, date, time of day, and the class of telephone service (business, residential, etc.).[9] Approximately 85% of 911 services include some form of enhanced 911 service.

7. Congress created the Federal Communications Commission "for the purpose [among others] of promoting safety of life and property through the use of wire and radio communication ...."[10] This Commission has jurisdiction to license the electromagnetic spectrum, and also to regulate "instrumentalities, facilities [and] apparatus" through which wire and radio services are provided.[11] It is difficult to identify a nationwide wire or radio communication service more immediately associated with promoting safety of life and property than 911. We believe that broad

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[2] CMRS is defined as "any mobile service... that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public...." The term "interconnected service" means "service that is interconnected with the public switched network...." Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, Title VI, §§6002(b)(3)(B), 107 Stat 312, 392(1992).

[3] The Petition for Reconsideration was filed in response to Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, September 23, 1993, 8 FCC Rcd 7700 (1993)(*Second Report and Order*). Because this inquiry is broader than the proposals made in the TX-ACSEC petition, we are initiating this separate proceeding.

[4] This paper was filed on July 5, 1994, as an *ex parte* comment to GEN Docket No. 90-314. It is attached at Appendix D.

[5] *Network Reliability: A Report to the Nation*, National Engineering Consortium, June, 1993 at Section F, page 1.

[6] Wireline carriers and 911 service providers may employ diverse routing of interoffice facilities, multiple 911 tandem switch architectures, alternate public safety answering positions (PSAPs), special marking of 911 equipment, back-up power sources for PSAP facilities and diverse links for automatic line identification database access to ensure 911 service is reliable.

[7] The use of the term "automatic number identification" or "ANI" in this NPRM is not intended as a reference to billing number presentation provided as part of Feature Group B or D local exchange services. Although the number presented to a PSAP on a wireline call is often derived from Feature Group B or D services, the number presented to a PSAP on a wireless call may be generated by several other means. Thus, the term ANI merely identifies a number associated with the caller and used to reference the caller's location. The term does not reflect a specific service or technology.

[8] Selective routing is not needed in all areas. This feature is useful when telephone exchange boundaries extend into two or more PSAP jurisdictions.

[9] A list of the 911 call features currently available to many emergency call taking organizations, listed in order of importance as defined by NENA/APCO leadership, is shown in Appendix B.

[10] 47 U.S.C. §151.

[11] 47 U.S.C. §151, §153(a), (b), Titles II and III.

availability of 911 and enhanced 911 services will best promote "safety of life and property through the use of wire and radio communication."

8. *Private Branch Exchange and Dispersed Private Telephone Systems.* Private Branch Exchange (PBX) and other dispersed private telephone systems may present location identification problems for emergency services personnel. PBX systems route calls between telephone stations in an organization and connect those stations to the public switched telephone network through trunk lines. A single PBX may serve a number of different buildings. When a caller dials 9-1-1 from a station served by a PBX, a PSAP attendant may be able to retrieve the street address of a main building (the billing address associated with the ANI). Determining the precise location of the caller within a large building or at a station within a PBX that serves more than one building, however, may be complicated and time-consuming in a situation where time is critical.[12] While it is technically feasible to include location identification information in transmitting calls from stations served by PBX or other dispersed private telephone systems, there currently is no uniform means for ensuring that this information reaches emergency services personnel. Moreover, telephone users may or may not be aware that their telephone service is provided through PBX systems, and, in any event, are unlikely to be aware of 911 capabilities or limitations of the PBX systems. Yet, the ability of 911 service providers to deliver life saving services to them may depend on PBX compatibility with enhanced 911 systems.

9. *Enhanced 911 and Wireless Systems.* While some wireless systems are capable of providing basic 911 service, few, if any, are currently capable of providing an enhanced 911 service. This raises public policy concerns because the number of calls to 911 from wireless users, such as cellular telephone customers, is increasing rapidly. More than 13,000 new cellular telephones are installed daily in the United States.[13] In major metropolitan areas, it is estimated that as many as 10% of the 911 calls originate from mobile radio service subscribers.[14] For example, in January 1993, one California Highway Patrol communication facility fielded 80,000 calls for emergency assistance, 25,076 of which were from cellular telephones.[15] In 1987, the Massachusetts state police received only about 300 cellular calls per month. By December 1992, that number had grown to more than 15,700.[16] We expect growth in the use of mobile radio services to continue. It has been estimated that by 1998 there will be 32 million cellular customers and 2.6 million Personal Communications Networks customers.[17]

10. The continuing growth of mobile radio service customers will increase the number of 911 calls that are placed from mobile telephones. As currently configured, however, wireless 911 services are inferior to the wireline 911 services that telephone users have come to expect. Specifically, 911 calls originated by mobile radio users generally do not provide PSAP attendants with the caller's precise location. Because the callers may not know their location,[18] the ability of emergency service personnel to respond is hindered.[19]

III. COMPATIBILITY OF PBX EQUIPMENT WITH 911 SYSTEMS

11. Several states and localities have passed regulations or ordinances for the purpose of requiring PBX equipment to becompatible with 911 systems.[20] The specific requirements, however, vary significantly from one state to another. While several types of equipment and services may be available to ensure accurate routing of 911 calls from PBX or other dispersed private telephone systems, a lack of uniformity in this equipment may impair public emergency services by delivering inaccurate, incomplete, or misleading call origination information to the public switched telephone network. Moreover, mutually incompatible systems for resolving this problem are likely to cause user confusion or higher costs in equipment or services.

12. We propose to amend Part 68 our rules to ensure the compatibility of PBX equipment with enhanced 911 services. The record in this proceeding, discussed below, indicates that market forces to date have not been effective in implementing a solution to this problem. States and localities are considering separate and possibly conflicting regulations on PBX owners and equipment. Failure to address the problem quickly could result in increased costs as

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[12] *See* Adcomm Petition at 3, citing a newspaper report of a fatality attributable partly to the misdirection of medical aid to a caller using a private phone system.

[13] This figure is based on 1993 data, as published in *The Wireless Factbook*, Cellular Telecommunications Industry Association, Spring 1994, p. 6.

[14] *Communications Daily*, "NARUC Notebook" (July 27, 1994) quoting Leah Senitte of the National Emergency Number Association.

[15] This number for cellular telephone calls does not include calls from fixed cellular "Freeway Call Boxes." *See*, W. Clay Paxton, "Future Vision II: The 9-1-1 Imperative", NENA News, Vol. 12, No. 2, May 1994, at pp. 20-28. *See also*, George Raine, "Cellular Phone Owners Dialing 911 Frivolously", The San Francisco Examiner, February 25, 1993.

[16] *See* W. Clay Paxton, *op. cit. See also*, Tony Rogers, "Cellular Samaritans Becoming the Eyes of the Highway Patrol", Associated Press, January 5, 1993.

[17] *The Wireless Factbook*, Cellular Telecommunications Industry Association, Spring 1994 p. 36.

[18] In Los Angeles County, 600,000 cellular/mobile 911 calls were placed in 1992. More than 25% of the callers could not identify their location. This information was related by William E. Stanton, Executive Director of NENA, during a presentation at the FCC on March 23, 1994.

[19] The following example illustrates the difficulties posed by the use of mobile radio services to reach 911 emergency services. At 2:50 AM on September 22, 1993, the Amtrak Sunset Limited derailed from the Bayou Canot Bridge in a remote area of the Mobile Delta. The mayday call from the train was received by the CSX Railroad office in Mobile which placed a call to 911, but incorrectly identified the location of the derailment as Bayou Sara, several miles south of the actual location. Consequently, dispatched rescue units were unable to find the derailed train. Subsequent to this action, a second call to 911 came in from an Amtrak employee on the derailed train using a cellular phone. The Amtrak employee was able to tell the 911 operator only that the derailment was somewhere on the Mobile River. While Mobile County has a modern enhanced 911 system, it was of no value with these calls. The first call displayed the address of the CSX station in downtown Mobile, and the second call from the derailed train displayed "mobile phone." *See NENA News*, "Mayday in the Mobile Delta," Dennis Stapleton, Vol. 12, No. 2, May 1994, at pp. 16-18.

[20] *See, e.g.*, Mississippi Code 1972 Annotated, tit. 29, Chapter 5, §§ 19-5-303.

equipment that is not compatible with enhanced 911 systems becomes more widely distributed. Accordingly, we find that it is in the public interest to propose rules to require that PBX and other dispersed private telephone systems (hereinafter referred to collectively as "PBX equipment") operate effectively with enhanced 911 systems.

A. Adcomm and Industry Proposals

13. *Adcomm Petition.* The Adcomm petition seeks to prevent situations in which the provision of emergency services to a caller is delayed because the caller's location cannot be precisely determined when the caller dials 9-1-1 from a telephone served by PBX equipment.[21] Adcomm proposes specific rules to ensure that telephone stations served by PBX equipment are compatible with public emergency access networks. Adcomm points out that the resolution of this problem will require accurate management of telephone number databases and may have implications for the North American Numbering Plan by creating additional demand for numbers.[22] Adcomm states, however, that its proposed amendments address only that aspect of Part 68 concerned with preserving the integrity of emergency services provided on the public switched telephone networks. Specifically, Adcomm's proposed rules are "... simply intended to align interface approaches without proposing to control user implementations or local exchange carrier (LEC) services."[23] Adcomm's proposal would: (1) require PBX equipment to provide specific location information of the calling station to enhanced 911 systems; (2) require premises owners to provide local telephone companies with information on their PBX systems; (3) require certain training, verification, supervision and testing procedures for PBX operation; (4) specify signal power limitations; and (5) set technical standards for compatibility with enhanced 911 systems, including trunk interface and signaling requirements.

14. *Industry Efforts.* The Telecommunications Industry Association (TIA), through a subcommittee of its Multiline Telecommunications Committee, has been working to develop technical standards for PBXs to resolve the Enhanced 911 problem.[24] In October, 1993, TIA issued a Technical Systems Bulletin (TSB-103) entitled "PBX and KTS Support of *Enhanced* 911 Calling Service", which addresses dialing, call routing, and caller location database issues associated with PBX and KTS support of enhanced 911 service providers. TIA anticipates final voting by the membership on these proposals in late 1994.

15. *Comments.* Commenters responding to Adcomm's petition generally acknowledge the need to ensure compatibility between PBXs and Enhanced 911 services, but take different positions on how compatibility may best be achieved. Bell Atlantic, BellSouth, GTE, and TIA urge the Commission to delay action pending industry consensus on standards. The North American Telecommunications Association (NATA) and the South Carolina Budget and Control Board (SCBCB) contend that the Commission should lead any such industry effort. SCBCB states it cannot endorse the Adcomm proposal due to potential technical and financial hardships.[25] NATA objects to Adcomm's proposed verification requirements and opposes new training requirements on customer premises equipment (CPE) installation personnel.[26] NATA argues that LECs do not offer the kind of interconnection of switched services that would permit PBXs to transmit station identification in a format that could be accepted or processed by the telephone network.

16. APCO, which supports the petition, expresses concern about PBXs that block 911 calls in favor of an internal safety service. APCO is also concerned about the confusion caused when an extra digit must be dialed to get an outside line before dialing 911 from a PBX station in an emergency. BellSouth, GTE, and NATA express concern about the cost of dedicated 911 trunks and the impact of the proposal on the North American Numbering Plan (NANP).[27] Adcomm notes that the enhanced 911 trunking mentioned in its petition was not intended to require PBXs to have dedicated trunks to PSAPs. Adcomm states that, under its proposed rules, end users and LECs may choose different ways of handling trunking.[28] GTE suggests there are particular difficulties identifying the location of calls placed from college campuses, hospitals, military installations and wireless PBXs.[29]

17. Commenters identified several specific elements that should be included in any resolution of the PBX/enhanced 911 compatibility issue. GTE states that compatibility will require the creation of a standard LEC/private switching system interface with identifying information for private switching system calling stations, private switching system compliance with NENA standards for the transmission of ALI data to the telephone company or caller location database, and the creation of either alternative number identification or Direct Inward Dial (DID) numbers for private switching system stations.[30] Bell Atlantic concurs with GTE that any technical standards should specifically include the signaling and protocol specifications that have been published by NENA, to ensure that calls sent from PBXs to 911 systems carry proper identifying information.[31] NATA states that any rules the Commission adopts should ensure that telephone companies develop and market the least costly form of Enhanced 911 interconnection, and that such costs be fairly distributed.[32] GTE

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[21] The problem may also exist for key telephone systems connected to Centrex. *See* TIA Technical Systems Bulletin (TSB-103), "PBX and KTS Support of *Enhanced* 911 Calling Service," (October, 1993) at 3.

[22] The Commission is currently examining various issues regarding administration of the North American Numbering Plan. *See Administration of the North American Numbering Plan, Notice of Proposed Rulemaking*, CC Docket No. 92-237, 9 FCC Rcd 2068 (1994).

[23] Adcomm Reply at 2.

[24] TIA is a membership organization of domestic and international providers of telecommunications products and services. Through various committees, TIA develops engineering standards and publications that facilitate interchangeability and improvement of products. Standards developed by TIA committees and adopted by TIA ballots are voluntary industry standards that represent an industry consensus.

[25] SCBCB at 2.

[26] NATA 7-9.

[27] Bell South at 2; GTE at 5; NATA 2-23.

[28] Adcomm reply comments at 3.

[29] GTE at 5-6.

[30] GTE at 2-4.

[31] Bell Atlantic at 1-2. A copy of the NENA protocol is attached as a appendix to Bell Atlantic's comments.

[32] NATA at 4-5, 6-7.

asserts that a solution may also require added functionality in end office switches and additional telephone number assignments.[33]

18. TIA contends that Part 68 should specify as few technical details as possible to avoid stifling technological advancement of enhanced 911 services and equipment. In order to assure that enhanced 911 services will work properly, TIA states that the regulations should: (1) clearly define the responsibilities of all entities involved; (2) reference the appropriate standards to be used, preferably national; (3) set reasonable deadlines for compliance; and (4) involve regulatory agencies in educating the public regarding the deployment and use of enhanced 911 calling service.

B. Discussion

19. We believe that federal rules for achieving uniformity are appropriate in these circumstances to avoid confusion among telephone users connected to PBXs and to ensure that PBX equipment operates on the public switched telephone network (PSTN) at an optimal level for emergency purposes. The Adcomm petition, the comments received, and published reports of difficulties in delivering emergency services to the proper location indicate that the incompatibility of PBXs with enhanced 911 systems is hampering public safety access through the public switched telephone network.

20. We propose to amend Part 68 of the rules to require compatibility of PBX equipment with enhanced 911 systems. We agree with Adcomm and several commenters that any Part 68 requirements must take into account industry standards, protocols and technical references. Moreover, the comments persuade us that any proposal for amending our rules must consider not only the delivery of ANI, but also issues such as ALI database administration and the delivery of other information, *e.g.*, calling party number, to the PSAP that may facilitate a more timely emergency response. We, therefore, initiate a Notice of Proposed Rulemaking to require compatibility of PBX equipment with enhanced 911 systems. The proposed rules are patterned closely after those proposed by Adcomm, with modifications to reflect some of the commenters' concerns. We seek comment on these proposed rules.

21. In considering the proposed rules, our paramount concern is to ensure that PBX equipment does not hinder delivery of emergency services by impeding the transmission of adequate location information over the PSTN. We believe that any rules adopted must provide sufficient flexibility to foster the development of alternative methods and technological innovation in resolving compatibility problems between PBX and other dispersed private telephone systems and enhanced 911 systems. Moreover, we believe that the proposed rules should carefully balance the need to achieve compatibility and the need to ensure that equipment owners and manufacturers are not unduly burdened in implementing such upgrades. We seek comment on whether the proposed rules permit sufficient flexibility in conforming PBX systems to the needs of their owners while ensuring that the location of callers to 9-1-1 is properly identified to PSAP operators. We seek comment on whether and how equipment manufacturers, multi-line telephone system (MLTS) service providers, local exchange carriers, public safety agencies, and others such as local building inspectors should be identified as responsible parties, as suggested in TSB-103. Commenters supporting this suggestion should discuss specific amendments to Part 68 that would achieve this objective. Further, we ask that commenters provide detailed analysis of the technical and cost considerations of implementing the proposed rules for equipment owners, equipment manufacturers, network service providers, and other affected parties. In addition, we seek comment on whether there are particular difficulties in applying the proposal to college campuses, hospitals, military installations or wireless PBXs, and on whether the proposed rules must be applied where the equipment serves a physically small location, such as a single story building, or a small number of closely situated telephone stations. Commenters should propose specific alternative language where they do not believe the proposed language is appropriate.

22. *911 Availability.* Both the Adcomm proposal and TSB-103 would require that PBX equipment properly route emergency calls dialed using the digits 911 or 9-911 (where 9 must be dialed to reach outside lines). TSB-103 notes that special dialing or routing features in PBX equipment, such as dial 9 blocking to prevent toll fraud and Automatic Route Selection for least cost routing, should not be implemented in ways that prevent 911 dialing. We tentatively conclude that a caller at a PBX station having the capability to reach the public switched network should have the ability to reach emergency services by dialing 911 without having to dial any additional digits. TSB-103 suggests that some form of user education or notification may be appropriate to ensure proper dialing by the casual user of terminal equipment within a PBX or dispersed private telephone system. We further propose to require that PBX equipment domestically manufactured or imported prior to the proposed implementation date of the rules be labelled with a warning describing its limitations for those attempting to use it to call enhanced 911. We seek comment on these proposed rules.

23. *Attendant Notification.* TSB-103 recommends that new PBX equipment be capable of alerting an attendant or other on-premises personnel and providing calling station information to such personnel when a 911 call is dialed. On-premises personnel may assist emergency services personnel in locating or assisting the caller, particularly on large premises like schools, hotels, or military installations. TSB-103 points out that some state laws prohibit attendant "bridge-on" to a 911 call (*e.g.*, a three way emergency call that includes the 911 caller, an attendant, and the PSAP operator) because it may create confusion. We propose to require PBX equipment to be capable of notifying an attendant, if one is present, and seek comment on our proposal. *See* Appendix C, proposed §68.320(e). We ask that commenters discuss any potential conflict with existing state or local regulations.

24. *ALI database maintenance.* Several commenters, as well as TSB-103, note that timely and accurate database maintenance is an essential element of enhanced 911 service. TSB-103 contends that any regulations should clearly define the responsibilities of all parties involved in implementing an enhanced 911 system. As noted above, accurate caller location information is vital to ensuring the timely delivery of emergency services through the public

[33] GTE at 2-3, 4-6.

switched telephone network. TSB-103 demonstrates that a variety of customer premises equipment configurations or network services may perform this function. Both Adcomm and TSB-103 envision database maintenance as a separate issue from that of PBX equipment compatibility with enhanced 911.

25. We propose to require coordination procedures to ensure accurate and timely transmission of database information by PBX owners to local exchange carriers. We expect that the proposed rules will permit accurate and timely database maintenance, irrespective of the services or technologies employed to update and transmit information to enhanced 911 systems. We seek comment on whether the verification and training procedures in the proposed rules are sufficient to ensure the delivery of accurate caller location information from PBX equipment to emergency services personnel. *See* Appendix C, proposed §§68.228 and 68.320. Commenters should state with specificity whether additional equipment or service requirements should be imposed to achieve compatibility.

26. *Station Number Identification (SNI).* Several states that have established 911 as the primary emergency telephone number require certain minimum information to be delivered to PSAPs. Typically, such states require the caller's station number, caller location identification, and a call-back number.[34] We tentatively conclude that our rules should establish that, at a minimum, a caller's telephone number, caller location identification, and a call-back number must be transmitted from the PBX or other dispersed private telephone system for use at the PSAP. We seek comment on these requirements and ask whether additional information requirements should be adopted. TSB-103 and GTE advocate the creation of alternative number identification (an "artificial" SNI) for each calling station on PBX equipment to facilitate delivery of caller location identification and to permit call-back by emergency services personnel. We seek comment on this approach, particularly with respect to commenters' concerns about its impact on the North American Numbering Plan (NANP). We ask that commenters describe in detail how the proposed rules would affect the NANP, and that proponents of any alternatives to these proposals include an assessment of the potential impact of such alternatives on the NANP, as well as specific proposed language for inclusion in the rules.

27. *Information Protocol Standard.* Bell Atlantic and GTE suggest that NENA standards for information protocol (the format in which information is transmitted for display on a PSAP attendant's screen) should be explicitly referenced in any rules governing enhanced 911 services that we adopt. We seek comment on this proposal, and a detailed analysis of the relevant cost and technical considerations. Specifically, we seek comment on whether this is the most appropriate format for transmitting information about 911 calls, and whether, or how, this format should be incorporated in our rules. Whether or not the NENA standard is appropriate for purposes of PBX compatibility with enhanced 911 systems, we believe that a standard protocol for transmission of information associated with 911 calls is essential. Costs for PBX equipment are unnecessarily increased by a multiplicity of formats, and we tentatively conclude that the potential for user confusion absent a uniform format warrants the adoption of a nationwide standard in our rules.

28. *Network Interface Standards.* TSB-103 notes that some PBX equipment may directly access the Automatic Location Identification Database Management System (ALI DMS) to input and update changes in station location records.[35] TSB-103 states that these data link interfaces should be standardized, and that such standards should address security and data integrity verification issues. We seek comment on this recommendation. Commenters should specifically address the technical feasibility, cost, and current availability of systems for ensuring security and data integrity verification. Commenters also should propose specific language for inclusion in the rules.

29. *Local Exchange Company Services.* We seek comment on the kind of LEC services that are essential to the compatibility of enhanced 911 systems with PBX equipment. Adcomm, TSB-103 and NATA acknowledge that telephone company services play an essential role in the identification of caller location to a PSAP. Local telephone companies provide facilities interface codes and tariffed network services that enable equipment registered at the Commission to be supported in the network. Their involvement is essential to enable PBXs to transmit proper identification and location information to a 911 tandem or PSAP. Specifically, we seek detailed information on the availability, cost, and any other factors affecting the implementation of LEC services to support the requirements set forth in our proposed rules or to support any alternative solution to the instant compatibility problem.

C. Implementation Schedule

30. We tentatively conclude that we should require rapid implementation of features capable of implementation with minimal difficulties for PBX equipment. Both the record in the Adcomm proceeding and TSB-103 indicate that coordination and standardization, rather than technical difficulties, are the chief obstacles to achieving compatibility between 911 systems and PBX equipment. In any event, minor technical obstacles should not unreasonably delay equipment modifications affecting public safety access. We believe that a proposal to require compliance as a condition of registration of new equipment would impose a minimal burden on manufacturers and suppliers, and would not impose significant burdens on users or customers served by 911 emergency systems. We ask for comment on this analysis.

31. We propose that the manufacture and importation of PBX equipment that does not comply with these provisions must cease as of one year from the effective date of the order adopting rules in this proceeding. In addition, the proposed rule would impose these requirements on equipment that is newly installed more than 18 months after the effective date of the order adopting rules in this proceeding, thus prohibiting the installation of non-complying equipment beyond that date. We do not propose to require manufacturers and suppliers to reregister grandfathered equipment or to reconfigure equipment that has been in-

[34] Depending on the technology developed for compatibility with 911, a PBX station call-back number may, in some circumstances, be different from the calling number.

[35] TSB-103 at 13.

stalled as of the effective date of the order. We tentatively conclude that the restrictions on importation, manufacture and installation of non-complying equipment are sufficient to promote rapid deployment of equipment that is compatible with enhanced 911 systems, and we seek comment on this analysis. In the interim period, we propose that any PBX equipment subject to these requirements that is manufactured or imported on or after 30 days from the effective date of order adopting rules in this proceeding that does not comply with the PBX rule provisions be labelled with emergency dialing instructions on the device and on the outside of the packaging in which it is marketed. We seek comment on these proposed dates and requirements. We invite alternative recommendations with an analysis of the costs and benefits of those alternatives.

IV. Compatibility of Wireless Services with Enhanced 911

32. The Texas Advisory Commission on State Emergency Communications (TX-ACSEC) filed a petition for reconsideration in the PCS proceeding asking that we require PCS licensees to provide accurate location information about 911 callers from the outset.[36] It also requested that we mandate a single enhanced 911 standard for all wireless technologies so that local governments are not required to expend scarce resources configuring their systems to handle a multitude of signalling protocols and interfaces. TX-ACSEC argued that we must act on these fronts.

33. Several parties, such as the Association of Public-Safety Communications Officials International, Inc. (APCO) and the National Emergency Number Association, filed comments in support of TX-ACSEC's position. KSI, Inc.("KSI"), agreed that we should require PCS licensees to provide enhanced 911 services, but argued against a Commission-mandated enhanced 911 standard. KSI stated that a single enhanced 911 standard could stifle the development of possible alternative solutions by lessening the availability of capital to companies, like KSI, with nascent enhanced 911 technologies. APCO-International and others also believe that we should establish performance requirements while allowing industry to develop the necessary standards. American Personal Communications, American Telephone and Telegraph, MCI Telecommunications Corporation and Telocator (PCIA)[37] all acknowledged the need for enhanced 911 capabilities in mobile telephone networks, but argued that enhanced 911 standards should be developed separately from the PCS proceeding so as not to delay the implementation of PCS.

34. We have become increasingly concerned about the inability of mobile radio systems to interface with the enhanced 911 systems that have been deployed in wireline networks.[38] In the *Second Report and Order*, we stated that industry and standards-setting bodies should direct particular attention to offering an emergency 911 capability for services that would work with enhanced 911 systems and, to the extent feasible, permit locating a caller when the caller does not know his location.[39] We expressed particular concern that unless such capability is designed into personal communications system (PCS) equipment, dialing 911 from a PCS telephone would not be equivalent to dialing 911 from a wireline telephone. We added that the health and safety of citizens, as well as the fullest commercial success of PCS, would be affected by whether PCS is capable of providing enhanced 911 services. Accordingly, we stated that we intended to initiate a future proceeding to address enhanced 911 and related issues with regard to PCS, cellular, and any other relevant mobile service.[40] In the *Memorandum Opinion and Order*, GEN Docket No. 90-314 (adopted June 9, 1994) at para. 202, we dismissed TX-ACSEC's petition for reconsideration, stating that the issues raised therein would be addressed in a separate proceeding.

35. On June 30, 1994, APCO, NENA, NASNA, and PCIA issued an "Emergency Access Position Paper" ("Joint Paper"), which they filed as an *ex parte* comment in the PCS proceeding. *See* Appendix D. The Joint Paper presents the consensus recommendations of these organizations to assist standards bodies in developing appropriate standards for emergency access from wireless service systems to "9-1-1 type systems."[41]

36. The record before us indicates support for incorporating enhanced 911 technology in mobile telephone networks. The record also suggests that parties are skeptical of our ability to mandate an enhanced 911 standard in the PCS rulemaking proceeding without significantly delaying the implementation of PCS. Accordingly, we are initiating this separate rulemaking proceeding to address the enhanced 911 capabilities of PCS, cellular, and other relevant radio services. We are basing most of our proposals on the Joint Paper.

B. Discussion

37. We believe that Commission action is necessary to ensure that, over time, mobile radio service users on the public switched telephone network have the same level of access to 911 emergency services as wireline callers. Wireless customers clearly expect access to 911 services, and may be unaware that their mobile radio services do not provide the kind of location information that emergency services personnel receive from stations on the wireline network. Thus, as the use of wireless services expands, those who access the public switched telephone network

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[36] TX-ACSEC indicated that the 911 program authorities in eleven states concur with its petition. These states included California, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, Oregon, South Dakota, Vermont and Washington.

[37] After it filed comments in this proceeding, Telocator changed its name to the Personal Communications Industry Association.

[38] Based on our experience with cellular and other mobile radio services, it appears doubtful that enhanced 911 interface capability will be implemented voluntarily.

[39] *Second Report and Order*, note 4, *supra*, paragraphs 139-140.

[40] *Id.* We have already proposed to require position determination capability in mobile satellite systems above 1 GHz, although current applicants do not intend to use their systems for extensive distress and safety communications. *See*, Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, *Notice of Proposed Rule Making*, CC Docket No. 92-166, 9 FCC Rcd 1094 (1992). As discussed in para. 38, we seek comment on whether mobile satellite services, among others, should be subject to requirements for enhanced 911 compatibility.

[41] NENA has since withdrawn its support of the Joint Paper, citing failure to suggest a specific time frame within which mobile radio services would have to provide more precise locations for 911 callers. *See* July 26, 1994 letter of Executive Director of NENA, to Chief Engineer, FCC.

through mobile radio units may suffer a degradation in access to 911 emergency services absent a requirement that mobile radio systems must be compatible with enhanced 911 services. Accordingly, we propose to require that mobile radio transmitters supplied to wireless customers provide the same level of access to 911 emergency services as is available to wireline customers.

38. As an initial matter, we need to define the categories of mobile radio services that might be subject to compatibility requirements with enhanced 911 services. Our initial view is that mobile radio services offering access to real-time voice services provided on the public switched network may be an appropriate definition.911 service today primarily depends on voice, or voice equivalent (text telephone or TTY)[42] communication. We believe that users of voice mobile radio services today reasonably expect to have access to emergency services through 911. These customers would seem to be the population of mobile radio users PSAP facilities are primarily organized to serve. For example, cellular radio systems already represent a significant, and increasing, community of 911 service users.[43] We seek comment on this analysis. Should any compatibility requirements that might be imposed on mobile radio services be limited to those features most closely resembling traditional 911 services? Would commercial mobile radio services (CMRS),[44] providing real-time voice be an appropriate category, or should other, more limited services, such as one-way paging or the Non-Voice, Non-Geostationary Mobile Satellite Service, be required to meet compatibility requirements for some or all 911 features? What are the social, economic and other costs of including or excluding various categories of mobile radio services from any 911 compatibility requirements that might be developed? What are the costs and benefits of requiring any or all of the various 911 features? What time frames would be appropriate for requiring such features? Commenters should discuss how these considerations might vary with respect to specific types of services, *e.g.* cellular, PCS, or mobile satellite services. While we do not initially propose to apply rules for 911 compatibility to private mobile radio services, which may not be available to the public or interconnected with the public switched network, we ask for comment on this decision. We request comments on whether and how the proposed performance requirements, particularly phase-in periods, should be applied to existing systems (*e.g.*, cellular) vis-a-vis new systems such as PCS. We also ask for comment on our proposal to limit this requirement to services capable of providing real-time voice.

39. With respect to appropriate features, we note that currently, mobile radio services, such as cellular, are able to provide access to 911 service, but they are unable to provide the information necessary for enhanced 911, such as the location of the caller (ALI), the number of the caller, call back capability, or an indication of the type of service required. By contrast, approximately 76% of wireline customers who have 911 services have access to these features. Availability of enhanced 911 service for wireless customers may require modifications to mobile radio handsets, mobile radio service provider networks, the public switched telephone network, or public safety access systems. In order to render functionally equivalent service, it appears that the mobile station must be able to communicate the information, *e.g.*, ANI and ALI, to the base station, and the base station must be able to interpret all information transmitted from the mobile unit, provide the proper priority handling of 911 calls, and forward sufficient information to the public safety answering point to provide call back capability, location information (enabling selective routing), and determination of the type of emergency service needed.

40. We propose to adopt rules to improve the access of users of mobile radio services to 911, particularly enhanced 911 services. While we do not anticipate adopting extensive technical standards for enhanced 911 operation -- industry standards-setting committees are better equipped to address precise technical requirements for enhanced 911 compatibility[45] -- we propose that general performance criteria be adopted. We will discuss the essential capabilities proposed in the Joint Paper for access to 911 and enhanced 911 through wireless services.

41. *911 availability.* The Joint Paper recommends, and we propose, that a user have the ability to reach emergency services from any service initialized[46] mobile radio handset[47] in a home service area or a subscribed-to roamed service area by dialing only 911. This means that any mobile radio transmitter that is service initialized on a radio network must be allowed to make a 911 call without a requirement for user validation. We ask commenters to describe the extent to which mobile radio services and equipment provide these capabilities today, and whether or to what extent implementation of these features would require hardware changes to the mobile equipment or the associated base stations. What considerations are raised for new or developing services? Commenters should specifically address the application of this feature to mobile radio handsets used on a "roaming basis" or outside a mobile radio service provider's roaming area. Commenters should provide specific data on the economic and technical feasibility of such a requirement. We propose that this dialing feature be made available one year after the effective date of the order adopting rules in this proceeding, and we seek comment on the ability of licensees and equipment manufacturers to implement the feature in this time frame.

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[42] The term "text telephone" or "TTY" replaces the term "TDD" or "telecommunications device for the deaf."

[43] In urban areas, 911 calls from mobile radio units currently account for 10% of all 911 calls. *Communications Daily*, "NARUC Notebook" (July 27, 1994) quoting Leah Senitte of the National Emergency Number Association.

[44] *See* note 2, *supra*, for definition of "commercial mobile radio service."

[45] We expect the industry committees to develop these standards working in conjunction with PCIA, APCO, NENA, and NASNA, among others. There are several standards bodies that are capable of assuming this work, such as Committee T1, sponsored by the Alliance of Telecommunications Industry Solutions (ATIS), and its various subgroups T1P1, T1S1, etc.; the Telecommunications Industry Association under TR 46 and TR 45.2; and research organizations, such as Bell Communications Research (Bellcore).

[46] Service initialized means that the user has purchased services from a wireless service provider.

[47] The Joint Paper uses the term "handset or wireless terminal." We ask whether the term "mobile radio unit" would represent an appropriate broadening of the scope of the availability requirement.

42. *Grade of service.* The term "grade of service" refers to the percentage of calls between the mobile transmitter and the PSAP that are blocked either within the radio or the wireline network. The interconnection of a mobile radio transmitter call with a PSAP attendant may involve several interconnecting networks, including mobile radio links and the wireline PSTN. The Joint Paper expresses concern that competitive forces, expected to drive service quality levels in a wireless environment, may result in higher blocking rates than wireline networks experience.

43. The Joint Paper recommends, and we agree, that standards bodies should investigate technical solutions or other strategies to ensure minimal blocking of 911 calls from mobile radio transmitters. Any overall grade of service objective will require a cooperative effort between the initiating, interconnecting, and terminating systems. Our initial view is that federal standards are not warranted at this time. We seek comment on this assessment. Commenters advocating federal standards should describe how grades of service would be defined, and discuss any jurisdictional implications of imposing such standards.

44. *911 call priority.* We seek comment on our proposal to require that, one year after the effective date of the order adopting rules in this proceeding, originating 911 calls must be assigned priority over non-emergency service calls. This priority would be assigned at the handset and would extend to placing the 911 call at the beginning of any queue for calls waiting to be placed in the mobile radio network. Because of the unknown nature and importance of calls in progress, this priority would not require the interruption of calls in progress. We seek comment on whether this capability would require any major equipment modifications. Do existing systems have this capability? If not, what obstacles exist for developing this feature? We seek comment on the technical feasibility and cost for licensees and equipment manufacturers of establishing priority for 911 calls in new and existing mobile radio networks.

45. *User location information.* The Joint Paper finds that the wireless system should have the ability to identify the location of a wireless terminal used to make a 911 call. We agree. Automatic location identification (ALI) is more easily accomplished within a wired telephone network because the location of each telephone is known. ALI is not as easy in a mobile radio network because the caller can be located anywhere in the network's service area. In a wireless network, a caller's approximate location can be determined by identifying the specific transmitter that is communicating with the caller. Such approximations, however, may only narrow the location of the caller to an area of a few square miles and may be of minimal use to emergency service personnel, particularly in urban settings. Moreover, to obtain precise geographic location information, a PSAP would need to know not only the latitude and longitude of the mobile unit, but also its elevation in the event the caller is located in a high-rise building.[48]

46. We seek comment on the specific technical and cost considerations affecting the implementation of an ALI requirement for enhanced 911 service to wireless customers that would include detailed location information.[49] While there are several possible methods available to provide location data with varying levels of precision, all of these raise issues regarding performance, cost or technical feasibility. These methods include: Global Positioning Satellites (GPS), including differential GPS;[50] time delay measurements; received signal strength; ranging and triangulation; received signal angle of arrival, *e.g.*, reception employing "smart" antenna technology or KSI's Direction Finding Localization System; CDMA time synchronization; commercial FM multilateration; LORAN reception; automatic vehicle monitoring (AVM), time-of-arrival measures; and, cell site/radio port sectorization. All of these methods offer varying degrees of accuracy, affordability, and implementation problems. As an example, GPS does not work well if a caller is inside a building or amid obstructions that attenuate or block the satellite radio signals. Terrestrial radio triangulation methods are also hampered by interference and by signal reflection (multipath), though they are not as affected as satellite communications by attenuation inside buildings. Commenters should also address whether adding ALI components would increase the size of mobile radio transmitters or threaten the market-driven evolution toward smaller devices.

47. We recently received a copy of a "Survey of Location technologies to Support Mobile 9-1-1," conducted by C.J. Driscoll & Associates for APCO and the State of California, department of General Services Telecommunications Division. A copy of the report is being placed in the record of this proceeding. This report surveys eighteen different location systems that either exist or are under development and may be suitable for automatic location identification for enhanced 911 service. We invite comment on the APCO report, specifically with regard to the feasibility and accuracy of the various systems for ALI for enhanced 911 and the cost estimates. We also solicit information as to any systems or technologies that are not discussed in the report.

48. We are aware that the industry is working with the public safety community to address many of the same issues that we are addressing in this proceeding, particularly with regard to ALI. A Joint Experts Meeting was held in early August under the auspices of the Telecommunications Industry Association TR45 Committee. We are inserting a copy of the report of this meeting in the record for comment. A second Joint Experts Meeting was held in mid October under the auspices of the Personal Communications Industry Association, focusing on PCS in particular.

49. Due to the concerns about technical and financial feasibility expressed by manufacturers and communications service providers, we tentatively conclude that compliance with any ALI requirement should be implemented in three steps. Under this approach, as a first step, wireless service

[48] The equipment used at the PSAPs would have to be modified to permit the use of geographic data instead of a street address. Precise location information, especially for a mobile radio transmitter, would have to be based on latitude, longitude and elevation. The transmitter would be unable to determine automatically a nearby street address, and, in fact, no street address may exist at the mobile unit's location, particularly in rural areas.

[49] In order to locate a caller within a 100 foot radius, 12 to 15 digits of latitude and longitude information must be relayed. Relaying this amount of information to the PSAP may require modifications in ALI services or in PSAP equipment. However, the representations by wireless interests that this capability currently is technically and financially infeasible are not documented in this record.

[50] We understand that the Federal Aviation Administration is participating in the development of an aircraft navigation system in which GPS corrections would be broadcast by satellites.

providers would be required to design their systems so that the location of the base station or cell site receiving a 911 call from a mobile unit is relayed to the PSAP. If the base station or cell site employs a sectored antenna, the information relayed to the PSAP would have to indicate the sector that received the call. We seek comment on our proposal that wireless base stations be capable, within one year after the effective date of the order adopting rules in this proceeding, to route 911 calls with sufficient location information to permit connection of the mobile station to the PSAP closest to the mobile caller.[51] It appears that this limited ALI information, at a minimum, should indicate the location of the base station receiving the 911 call and, if sectored antennas are employed, the direction (sector) of the mobile unit from the base station or cell site. We seek comment on this analysis, and on the means of transmitting this information to the PSAP, *i.e.*, network elements, information protocol standards, location information updates, and speed of transmission. Compatibility seems to require that these features be passed through the PSTN to the PSAP in a manner and format capable of being used by those facilities. We seek comment on whether the proposed rule allows licensees and equipment manufactures sufficient time to develop these features, and on the technical and cost considerations involved in implementation.

50. In the second stage, the associated base station or cell site should be capable of relaying more precise information. Specifically, we propose to require that, three years after the effective date of the order adopting rules in this proceeding, the ALI information provided to the PSAP must include an estimate of the approximate location and the distance of the mobile unit from the receiving base station or cell site, calculated on the basis of the received signal strength or by some other method. If a signal is received by more than one cell site, we assume the site at which the signal is strongest becomes the controlling site for the call. We seek comment on whether this assumption is correct. We ask that commenters address whether more precise location identification requires identification of the cell site only or identification of a specific base station. We seek specific and detailed analysis of the technical and cost considerations involved in such implementation, and of the time provided to licensees and equipment manufactures to develop these features.

51. In the third phase, we propose to require that, five years after the effective date of the order adopting rules in this proceeding, the mobile station be located in a 3-dimensional environment within a radius of no more than 125 meters. This information should enable the PSAP to assist emergency services personnel by providing a relatively precise location for a 911 caller using a wireless service. Even greater accuracy could be necessary in urban environments to determine the precise location of a caller within a multi-story structure. On the other hand, location information consisting only of latitude and longitude may be sufficient for radio transmitters operating outside of an urban environment. We request comments on the feasibility of this approach both technically and economically, and on whether the rules propose an appropriate time frame for implementation of these features. Commenters should provide detailed and specific analysis of and support for their conclusions. We ask whether more precise location requirements should be specified in the rules. Commenters should provide analysis demonstrating the feasibility of any proposed requirements. Commenters should also provide specific time periods for various industry segments and feasibility analysis if they recommend more rapid phase-in than the three stage approach proposed in this Notice.

52. *Re-ring/call back.* We request comment on the technical and economic feasibility of wireless services to provide the capability to return calls placed from mobile radio transmitters to a 911 emergency number immediately. We propose to require that, within three years of the effective date of the order adopting rules in this proceeding, wireless systems must provide PSAP attendants with the capability to call back the 911 caller if the call is disconnected.[52] We seek detailed analysis of existing and potential capabilities of wireless services to provide information that permits immediate call back to the mobile user. For example, commenters should indicate whether at present when emergency calls are dialed to 911, the PSAP sees the call as originating from a mobile radio subscriber. It appears that many types of mobile radio units, such as cellular, transmit ANI for subscriber billing purposes, and that this information does not pass to the PSAP.[53] We seek comment on whether the directory number of the mobile unit, the subscriber's billing number, or some other number must be transmitted to the PSAP to provide call back capability, or whether call back to the mobile unit may be accomplished by other means. Ideally, this feature would represent a seamless process whereby any return call from the PSAP is connected directly to the mobile unit that originated the call. We seek comment on the technical feasibility and cost to licensees and equipment manufacturers of implementing immediate call back, and request comment on whether the proposed rule provides sufficient time to develop such a feature.

53. *Common Channel Signaling.* The Joint Paper concludes that radio transmissions of 911 calls eventually should be capable of providing the same or similar information and features currently available from wireline calls over enhanced 911 systems. In addition to the ALI and call back information discussed above, the adoption of this performance criterion would require providers to ensure that some or all of the following information is furnished to the PSAP:

- Call back number and the mobile transmitter subscriber's name
- Location of call origination (ALI), as discussed above
- Class of service, *e.g.*, residence, business, etc.
- Base station provider's name and telephone number

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[51] We do not propose to change the implementation date that is adopted in CC Docket No. 92-166 for mobile satellite services position determination information. *See* note 41, *supra*.

[52] This assumes that the mobile radio can receive the return call, *e.g.*, the mobile user has not turned off the mobile unit.

[53] One reason for this blockage for cellular systems has to do with the "roaming" feature of cellular: when outside the home area, a cellular subscriber's seven digit ANI, billing number in this case, is of no use unless it is accompanied by a roaming code, typically requiring 10 digits instead of seven. PSTN switching facilities that process mobile radio calls and PSAP premises equipment would have to be modified in order to receive and use 10 digit numbers.

- Priority of the caller, *e.g.*, hospital, school, etc.
- Routing information to direct the call to the proper PSAP (primary and secondary PSAP identifiers)
- Transfer numbers, *i.e.*, separate numbers to allow transfer ofcalls to police, fire and ambulance services

We request comment on the feasibility of these features, which would permit radio transmission systems to interface fully with enhanced 911 systems. We also propose to require that common channel signalling capabilities be implemented within three years after the effective date of the order adopting rules in this proceeding, and we request comment on this proposal and timetable. In addition, we seek comment on whether the reliability of 911 technology will be hampered if 911 services are transferred to common channel signaling, and on how these features would affect the survivability of 911 SS7 based calls during a common channel signaling outage. We note that the Network Reliability Council has recommended that, before 9-1-1 calls are handled by SS7, standards bodies must determine whether additional standards are needed for SS7 protocol.[54]

54. *Access to text telephone devices (TTY).* We propose that, within one year of the effective date of the order adopting rules in this proceeding, radio services must be capable of permitting access by individuals with speech or hearing disabilities through means other than mobile radio handsets, *e.g.*, through the use of a TTY device. To the extent radio services are accessible to TTY devices today, those services will be able to provide access to 911 service.[55] It is not clear from the Joint Paper or the record what Commission rules or policies would be necessary or appropriate to ensure access to 911 services for TTY-like devices beyond the general requirement that services be compatible with such devices. We seek comment on how to ensure access to 911 service by TTY-type devices that use wireless services, and request comment on the specific additional features, costs and feasibility issues that may be relevant to achieving compatibility.

55. *Equipment Manufacture, Importation, and Labeling.* We seek comment on an approach that would permit wireless providers to employ whatever technologies achieve the required objectives. Features such as ANI and ALI might be implemented in a variety of ways. For example, while we anticipate that mobile equipment would generally need to include equipment to determine and transmit location information, it is feasible that other methods may be used, such as the type of technology described by KSI, that do not require such features to be included in the mobile transmitter. Nevertheless, we solicit comments as to whether it may be necessary to establish specific requirements for base and mobile transmitters to ensure compliance with the objectives of this proceeding, particularly with regard to ANI and ALI. Further, we request information as to what those standards should be. If specific requirements for transmitters are necessary, we contemplate requiring the submittal of information demonstrating compliance as part of the equipment authorization process. We also invite comment as to whether it may be appropriate to establish cut-off dates for manufacture, importation and marketing of equipment that may not meet the standards and how much time should be allowed for transitions to equipment that meets the new requirements. Comments are requested as to whether it may be appropriate, within 30 days after the effective date of the order adopting rules in this proceeding, to require equipment that does not meet the proposed requirements to be labelled with the following statement on the device and on the outside of the packaging in which it is marketed:

> You may use this transmitter to dial for help through 911. The person answering may not know where you are, or how to call you back, unless you accurately provide your location and your full telephone number, including area and/or roaming codes.

V. ADDITIONAL CONSIDERATIONS

56. *Privacy.* We seek comment on the necessity for, and implications of, imposing privacy requirements on information transmitted to local exchange carriers and PSAPs in the delivery of 911 emergency services. In adopting federal rules for carriers that provide calling number identification services, the Commission declined to apply privacy protection requirements in circumstances which did not appear to raise serious privacy implications, including calls within private systems and calls to emergency service providers.[56]

57. The states, however, have adopted varying approaches to the privacy afforded a subscriber's name, address, and telephone number when that information is used in the delivery of emergency services. For example, Florida, Georgia and Iowa prohibit the release of information, other than the name, address, and telephone number of the caller, obtained in the delivery of emergency services. Iowa, South Dakota, and Wyoming waive state privacy requirements for nonpublished numbers for the purpose of delivering emergency services. We note that while the provision of emergency services is essentially local in nature, the use of mobile radio transmitters to place 911 calls may involve emergency service providers located in more than one jurisdiction. Moreover, there is an important national interest in preserving uniform accessibility to 911 services. We ask commenters to address whether there are privacy interests in information transmitted by wireless service providers pursuant to the delivery of emergency services, and if so, what specific measures are appropriate to protect those interest.

58. *Compatibility with Network Services.* We ask whether other steps need to be taken to ensure the American public continues to have access to effective 911 services. For example, private network services offered by telephone companies are not accessible simply by dialing 911. Instead, as

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[54] *Network Reliability: A Report to the Nation*, Federal Communications Commission's Network Reliability Council, June 1993, Section F, page 16.

[55] Title II of the Americans with Disabilities Act (ADA) requires direct access between TTY users and PSAPs. *See* 42 U.S.C. Section 12131 *et. seq.* Under the ADA, all public utilities that provide telephone emergency services -- 911 access -- were required to be accessible to people with hearing and speech disabilities by January 26, 1992. Section 35.162 of the Department of Justice regulations implementing Title II of the ADA requires "direct access" to telephone emergency services.

[56] *See Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. No. 91-281, 9 FCC Rcd 1764 (1994).

with PBXs, an initial "9" first must be dialed. We ask parties to comment on whether rules should be adopted to require such services to permit access simply by dialing 911. In addition, it appears that not all telephone companies provide priority for 911 calls in accessing the central office switch, prior to being sent to the 911 tandem. We seek comments on whether we should impose uniform requirements. Commenters should discuss any jurisdictional issues that might be raised by imposition of such standards.

59. *Preemption.* We believe that our proposed rules imposing uniform requirements for compatibility of enhanced 911 systems with wireline equipment and wireless services are consistent with our responsibilities under Section 1 of the Communications Act to promote safety of life and property. The Commission has the authority to preempt state regulation that affects interstate service when it is not possible to separate the interstate and intrastate components of the service, or when state regulation thwarts or impedes a federal policy.[57] We seek comment on any potential conflicts between our proposed rules and existing state regulation affecting PBX equipment or wireless services.[58] Commenters opposing preemption should suggest specific alternatives for ensuring that inconsistent federal, state, and local requirements do not thwart the nationwide goal of achieving compatibility with enhanced 911 systems.

VI. CONCLUSION

60. For the reasons set forth above, we seek comment on all aspects of this *Notice of Proposed Rulemaking* and the specific proposed rules set forth in Appendix C. Our objective is to ensure that the American public continues to have access to effective 911 services. In the *Notice of Proposed Rulemaking*, we propose rules to ensure compatibility of PBX equipment with Enhanced 911 systems, including procedures for verifying that the location of callers using PBX equipment is received at the appropriate public safety answering point. We seek comment on whether these proposals permit sufficient flexibility in conforming PBX equipment to the needs of their owners while ensuring that the locations of callers to 9-1-1 are properly identified to PSAP operators. In addition, we seek comment on proposals that wireless service providers ensure that mobile radio units supplied to their customers provide the same level of access to 911 emergency services as is generally available to wireline customers. We request comment on the technical and economic feasibility of making wireless services compatible with enhanced 911 services, and on whether wireless service providers should implement the following features: 911 access communicating call origination information; providing priority handling of 911 calls; and forwarding sufficient information to the 911 exchange to provide call back capability, location information, and determination of the type of emergency service needed. We seek comment on whether or what privacy considerations should apply to the provision of enhanced 911 services. Finally, we seek comment on whether additional steps are necessary to ensure that the benefits of 911 services are not diminished by new developments, including comments on what additional rules should be proposed to ensure universal 911 access policies, and for an analysis of jurisdictional issues that might be raised.

VII. ORDERING CLAUSE

61. Accordingly, pursuant to Sections 1, 3, 4, 5, 201-205, 208, 215, 218, 226, 227, 302, 303, 313, 314, 332, 403, 404, 410, 602 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 155, 201-5, 208, 215, 218, 226, 227, 302, 303, 313, 314, 332, 403, 404, 410, 602, IT IS ORDERED that NOTICE OF PROPOSED RULEMAKING is hereby provided to amend Sections 68.1, 68.3, 68.106, 68.228, 68.308, and 68.320 of the Commission's rules, 47 C.F.R. §§ 68.1, 68.3, 68.106, 68.228, 68.308, 68.320, as indicated above and in Appendix C hereof.

VIII. ADMINISTRATIVE PROVISIONS

62. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

63. *Initial Regulatory Flexibility Analysis.* As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested in the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

64. *Comment dates.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before January 9, 1995 and reply comments on or before February 8, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply

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[57] *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375 n.4 (1986); *Illinois Bell Tel. Co. v. FCC*, 833 F.2d 104 (D.C. Cir. 1989); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Texas Public Utility Comm'n v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). *See also CMRS Order*, 9 FCC Rcd at 1506 & n.515.

[58] For example, the State of Washington adopted legislation in March, 1994 requiring cellular (or wireless) companies to provide ANI data for PSAP use. "Cellular Taxation for 9-1-1 in Washington State, House Bill 2601," *NENA News*, May 1994, pp. 32-34.

comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

65. The proposed action is authorized under Sections 1, 4, 5, 201-205, 208, 215, 218, 226, 227, 302, 303, 313, 314, 332, 403, 404, 410, 602 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 155, 201-5, 208, 215, 218, 226, 227, 302, 303, 313, 314, 332, 403, 404, 410, 602.

66. For further information regarding this *Notice of Proposed Rule Making*, contact Suzanne Hutchings, Domestic Facilities Division, (202) 634-1802, or John Reed, Office of Engineering and Technology, (202) 653-7313.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action: This Notice of Proposed Rule Making responds to the petitions submitted by Texas Advisory Commission on State Emergency Communications (TX-ACSEC) and Adcomm Engineering Company to address issues raised by the provision of enhanced 911 services through commercial mobile radio systems, private branch exchanges, and similar equipment. Telephone stations for wireless services and wireline stations served by PBX equipment are not adequately identifying caller location to permit a timely response by emergency services personnel.

Objectives: The objective of this proposal is ensure access to enhanced 911 emergency systems on the public switched telephone network for callers served by private branch exchanges other dispersed private telephone systems, and for callers served by certain mobile services.

Legal Basis: The proposed action is authorized under Sections 1, 4, 5, 201-205, 208, 215, 218, 226, 227, 302, 303, 313, 314, 332, 403, 404, 410, 602 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 155, 201-5, 208, 215, 218, 226, 227, 302, 303, 313, 314, 332, 403, 404, 410, 602.

Reporting, Record Keeping and Other Compliance Requirements: Private branch exchanges and other dispersed private telephone systems will be required to maintain records for calling number identification, caller location identification, and a call-back numbers for each of their calling stations. Commercial mobile radio services will be required to identify the location of mobile transmitters and provide call back numbers for them. Equipment used for private branch exchanges and other dispersed private systems and commercial mobile radio services will have to be capable of providing this information to the local telephone exchanges to which they are connected. Local telephone exchanges will incur costs storing and relaying this information to enhanced 911 public service answering points.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

Description, Potential Impact and Number of Small Entities Involved: The proposed changes in the regulations would affect a number of entities both large and small. An estimate of such parties affected is approximately 65 million new wireless services users and approximately 4 million PBX equipment manufacturers and owners.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with Stated Objectives: With respect to PBX equipment, the NPRM asks whether the proposed rules must be applied where the equipment serves a physically small location, such as a single story building, or a small number of closely situated telephone stations.

APPENDIX B

911 CALL FEATURES

This appendix identifies 911 call features currently available to many emergency call taking organizations, listed in order of importance as defined in NENA/APCO leadership.

- Ability to reach emergency services by dialing 911
- Ability to permit call precedence for 911 over other call types
- Ability to identify caller's geographic location
- Ability to hear and determine the type of emergency services needed
- Ability to receive 911 calls within their jurisdiction (Selective Routing)
- Ability to detect and communicate with TTY and data callers
- Ability to hold the line for trace, after the caller has disconnected (Called Party Hold), or the ability to call back
- Ability to call the caller back after disconnection and/or perform re-ring with thecalled party held
- Ability to transfer the caller to the appropriate PSAP
- Ability to transfer the information screen to the appropriate PSAP
- Ability to force disconnect, regardless of the caller switch hook status

APPENDIX C

PROPOSED RULES

Part 68 of the Commission's Rules and Regulations (Chapter 1 of Title 47 of the Code of Federal Regulations, Part 68) is proposed to be amended as follows:

1. The authority citation for Part 68 remains as follows:

AUTHORITY: Sections 1, 4, 5, 201-205, 208, 215, 218, 226, 227, 303, 313, 314, 403, 404, 410, 602 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 155, 201-5, 208, 215, 218, 226, 227, 303, 313, 314, 403, 404, 410, 552.

2. Section 68.1 is proposed to be amended by deleting the present Section 68.1 in its entirety and substituting the following:

§ 68.1 Purpose

The purpose of the rules and regulations in this part is to provide for uniform standards for the protection of the telephone network from harm caused by the connection of terminal equipment and associated wiring thereto, for the correct operation of terminal equipment with public emergency access networks, and for the compatibility of hearing aids and telephones.

3. Section 68.3 is proposed to be amended by inserting, according to the alphabetical order of the term defined, each of the following definitions among the definitions already present:

*****

Enhanced 9-1-1: A telephone network feature that automatically provides emergency response agencies with telephone directory number and location information on calls placed to the national emergency number, 9-1-1.

*****

Enhanced 9-1-1 compatibility: The ability to relay a number associated with each served emergency response location.

*****

Enhanced 9-1-1 emergency services trunk: Any 2-wire or 4-wire telephone connection that provides access to Enhanced 9-1-1 service.

*****

Dispersed private telephone system: A PBX or similar multi-line telephone system whose connection to the telephone network carries emergency calls from more than one emergency response location.

*****

Emergency response location: A specific site, corresponding to a calling station in a dispersed private telephone system.

*****

Restriction: The blocking of specific dial codes and sequences during call initiation.

******

3. Section 68.106 is proposed to be amended to read as follows:

§ 68.106 [Amended]

*****

(f) *Dispersed private telephone system trunk and station number verification for Enhanced 911 purposes.* Customers who install dispersed private telephone systems after [insert date 18 months after effective date of order adopting rules in this proceeding] shall provide the telephone company with:

(1) The number of trunk connections desired

(2) The number of stations that may originate emergency calls

(3) The number of, and identification of emergency response locations that will require number identification.

(4) The FCC Registration Number of the equipment being used.

The telephone company will provide 10-digit numbers for the identified emergency response locations.

Section 68.228 is proposed to be added as follows:

§ 68.228 Enhanced 911 trunk and station number verification.

a) *Verification requirements.*

(1) *General.* The proper transmission of station number identification (SNI) for the station dialing the emergency number 911 shall be verified as part of initial installation and subsequent changes in emergency response location data.

(2) *Station Number Identification.* The 10-digit station number identification transmitted for 911 calls shall be verified to: (i) be in the group of station numbers assigned to the trunk by the telephone company and, (ii) be assigned to the specific emergency response location of the corresponding calling station.

(b) *Verification personnel.* Work associated with the verification of Enhanced 911 emergency services trunk operation shall be performed under the supervision and control of a supervisor as defined in paragraph (c) of this section. The supervisor and installer may be the same person.

(c) *Supervision.* Work by installation personnel shall be performed under the responsible supervision and control of a person who:

(i) Has at least 6 months of on-the-job experience in the installation of telephone terminal equipment;

(ii) Has been trained in the operation of Enhanced 911 emergency services trunks and in the performance of operations need to verify proper identification procedures and results.

(iii) Or, regardless of compliance with paragraphs (c)(1) and

(c)(2) of this section, is a licensed professional engineer in the jurisdiction in which the installation is performed.

(d) *Verification procedure.* The installation supervisor shall provide written notification to the telephone company that the required verification tests have been performed, including the following information:

(1) The responsible supervisor's full name address and business telephone number; and

(2) The date when Enhanced 911 trunks will go into service, the date when the verification tests were completed, and a list of trunk identification numbers and station numbers verified.

(e) *Verification of changes.* Addition or deletion of Enhanced 911 data base entries will be cause for verification of operation.

3. Section 68.308 is proposed to be amended to read as follows:

§ 68.308 Signal power limitations.

*****

(b)***

(5)***

[In the table "MAXIMUM ALLOWABLE NET AMPLIFICATION BETWEEN PORTS (A)(B)(E)(F)" should show that enhanced 911 trunks operate with the same requirements as Public Switched Network Ports (2-Wire) by adding the words "Enhanced 911 trunks" after "Public Switched Network Ports (2-Wire)" in the first box at the top of the second column from the right.]

*****

Section 68.320 is proposed to be added as follows:

§ 68.320 Enhanced 911 compatibility: technical standards.

(a) *Trunk interface.* Enhanced 911 trunks are analog two-wire or four wire channels supporting either E&M type 1 or E&M type 3 signaling.

(b) *Station Number Identification signaling.* The station number identification (SNI) code assigned to the emergency response location of a 911 caller will be sent from the registered equipment to the telephone company 911 system using multifrequency (MF) tone pulses, prompted by a solid off-hook indication from the telephone network.

(c) *Operability.* It shall be possible to access the Enhanced 911 trunk in emergencies whether or not system features are used that block access to normal dial trunks (*i.e.*, restriction of all calls beginning with "9"). Access shall be provided whether users dial 911 or additional digits preceding 911.

(d) *Equipment levels.* The minimum number of Enhanced 911 emergency services trunks connecting a private switch to the telephone network shall be one (1). Additional trunks may be used at the user's option. Additional trunks shall be added to maintain an availability of P = 0.01 based on the number of users served.

(e) *Attendant Notification.* Equipment manufactured or imported after [one year after the effective date of the order adopting rules in this proceeding], or installed after [18 months after the effective date of the order adopting rules in this proceeding], must be capable of notifying an attendant or on-premises personnel, if present, and of providing station number identification and emergency response location to the attendant when a 911 call is dialed.

(f) *Information Requirements.* Equipment manufactured or imported after [one year after the effective date of the order adopting rules in this proceeding], or installed after [18 months after the effective date of the order adopting rules in this proceeding], must have the capability to provide the caller's station number identification, caller location identification, and call back number to PSAP personnel.

(g) *Labeling Requirements.* PBX and dispersed telephone systems manufactured or imported one year from the effective date of §68.320 shall comply with this section. Equipment of earlier manufacture shall comply with the subsection if installed [eighteen months from the effective date of the section] or any time thereafter. Such equipment must be reregistered by the manufacturer or other person responsible for equipment compliance with Part 68, if already registered but not compliant with §68.320. Dispersed private telephone systems and associated station equipment that are domestically manufactured or imported on or after [30 days, but not later than one year, from the effective date of the order adopting rules in this proceeding] that does not comply with §68.320 must be labelled by the manufacturer with a warning describing its limitations for those attempting to use it to call enhanced 911. The warning must appear on the devices and on the outside of the packaging in which it is marketed. The domestic manufacture or importation of dispersed private telephone system equipment that does not comply with §68.320 must cease as of one year from the effective date of §68.320.

PCIA, APCO, NENA and NASNA Emergency Access Position Paper

This paper presents a jointly developed position of PCIA, APCO, NENA and NASNA organizations to assist standards bodies in their development of appropriate standards for the implementation of access to emergency services from wireless communications systems via 9-1-1 type systems. It is the result of a joint analysis and an effort to resolve challenges to both the public safety as well as the wireless manufacturers and service provider communities. All participants in this effort have a desire to maximize the ability of using wireless access to facilitate rapid and effective contact with emergency services, when and where needed.

However, each group has a unique set of challenges to consider. The public safety organizations and their membership have an imbedded infrastructure base that they wish to guard against obsolescence. Wireless access implementations need to consider the ability to locate 9-1-1 callers and interwork with existing emergency service bureau systems, to guard against this obsolescence. The wireless manufacturers and service providers have economic and technological targets that must be met or new services such as Personal Communications Services (PCS) will, at best, be stymied or may never be launched.

The positions and requirements expounded here represent an effort to address the concerns of all participants. These recommendations (requirements) will be submitted as contributions

to the appropriate standards organizations for definition and adoption.

Introduction

This joint document has been prepared and is presented by the Personal Communications Industry Association (PCIA), the Association of Public Safety Communications Officials-International, Inc. (APCO), the National Emergency Number Association (NENA) and the National Association of State Nine One One Administrators (NASNA). A description of each organization is contained in Appendix A.

Discussion

The basic 9-1-1 (9-1-1) and Enhanced 9-1-1 (E9-1-1) systems in existence today have been designed to provide rapid response to calls for emergency services from landline subscribers. Existing basic 9-1-1 emergency services systems establish routing of calls to a Public Safety Answering Point (PSAP). E9-1-1 provides added capabilities including selective routing of a call to the appropriate PSAP for quick response to emergency calls, display of calling number, address and, in most cases, the name of the subscriber at the calling number. However, these systems may not address the particular and unique requirements of wireless communications environments. Appendix B defines emergency service call taker information and feature priorities for both wireline and wireless systems.

The mobile nature of wireless services and the unique qualities of Radio Frequency (RF) propagation may require adaptation of

existing emergency services systems and development of special location capabilities in wireless systems.

Emergency services access (9-1-1/E9-1-1) in a wireless environment needs the capability to identify the location of the radio port or cell site (or sector if sectored) serving the calling party. This level of location identification will provide information to assist in routing the call to the proper PSAP and serve as a beginning point from which more precise user location capabilities can be developed, as technology and economics allow.

The wireless user may be reporting an emergency while mobile and may be some distance away from the emergency when the call is completed. The call-taker will still need to verify the caller's location. This situation exists today for the wireline 9-1-1 callers because they may be reporting from a location remote from the incident. Modifications to many of the existing emergency services systems will be necessary to provide both location and call back number.

New and developing wireless services, particularly PCS, will have new signaling platforms and protocols which might not be compatible with the existing information retrieval capabilities of the current emergency services systems. An additional challenge for interconnection of wireless telephone systems and emergency services systems will be to not substantially modify PSAP call taker procedures. The end user (PSAP call taker) processes should be similar to existing processes even though some infrastructure changes (such as signaling and data interfaces) may be necessary.

Requirements

Currently wireless systems communicate with a number of emergency service entities. These include basic 9-1-1 systems, enhanced 9-1-1 systems, police dispatchers, etc. The following requirements deal with wireless access to 9-1-1 - type systems. These requirements do not necessarily apply to wireless access to non-9-1-1 type systems.

1. 9-1-1 Availability

A user should have the ability to reach emergency services from any service initialized[1] wireless handset in a home service area or subscribed-to roamed service area by dialing the three digit number 9-1-1. No additional dialing digit sequence should be required to reach emergency services[2]. In addition, dialing 9-1-1 must override any lockout requirement for the handset or wireless terminal. Any handset that is service initialized on a wireless network must be allowed to make a 9-1-1 call, without a requirement for user validation.

2. Grade of Service

End to end grade of service objectives for wireless emergency access may involve several systems. Initiation of a wireless emergency access call will involve a wireless access system. Interconnection of the caller with a public safety call taker may involve interconnecting networks (e. g. PSTN) and termination of

---

[1] Service Initialized means that the owner has purchased services from a wireless service provider.

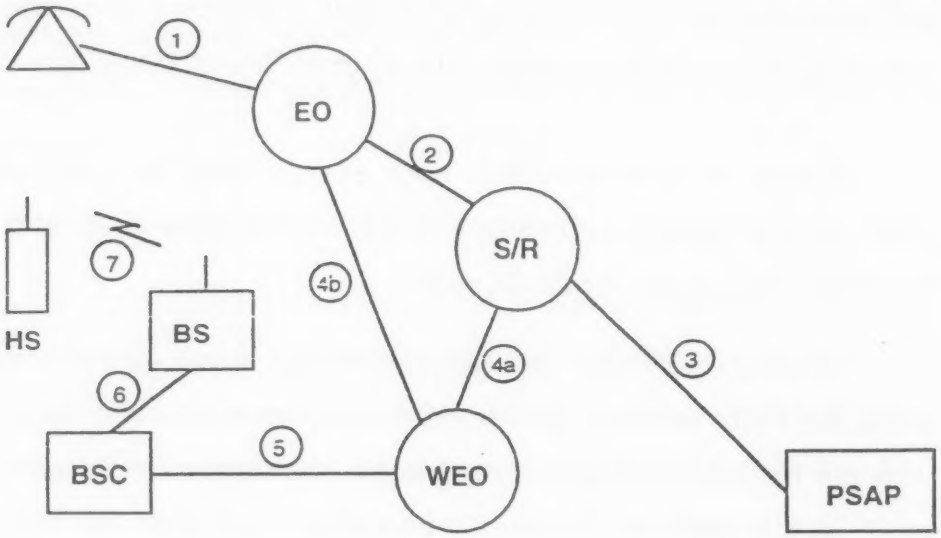
[2] This requirement does not preclude the implementation of an "emergency button" on the handset or the use of voice recognition to invoke the request for emergency access.

the call will involve the PSAP systems. Hence an overall grade of service objective, between a person in distress and a call taker, will require a cooperative effort between these initiation, interconnection, and termination systems. Proportioning grades of service within each system to reach overall objectives will need to be agreed upon locally and comply with appropriate local regulations.

Grades of service within each system will be established utilizing appropriate engineering and economic guidelines and are not areas subject for standardization.

Portions of the network used for emergency access may be the same for both wireline and wireless implementations. In some wireless implementations, a completely separate network may be used. In this instance, there could be a direct path from the wireless network to the Selective Router (S/R) or the PSAP. In other implementations, some portion of a LEC-based wireline network might be used to access the S/R or PSAP.

The following figure is an example of one network implementation and does not imply any particular ownership of the various network elements.



EO - end office (e.g., Class 5) S/R - selective router
HS - handset BS - base station
BSC - base station controller WEO - wireless end office
PSAP - public safety answering point

Link 1, between a wired telephone and an end office, is currently designed for a specified quality of service. This design is for minimum quality of service standard, and is typically specified by a State Public Utility Commission (PUC) and is not specifically designed for the requirements of emergency access. Links 7, 6 and 5 in a wireless system are analogous to link 1 in a wireline application, in that they are both the access path to an end office switch. Link 7 is

the radio path between the wireless terminal to the base station. Links 6 and 5 are generally designed to carry as much traffic as is generated over the radio links, in order to minimize call blocking. The driving force for the grade of service design for these links is the competitive environment in which wireless access services will exist. This necessity to compete in an area serviced by as many as 6 PCS, 2 cellular, 1 Enhanced Specialized Mobile Radio (ESMR) licensees and perhaps multiple local exchange carriers will prompt each service provider to maintain a grade of service high enough to keep customers (i.e., minimize blocking).

Links 2 and 3 however, may be interswitch trunks, whether dedicated or virtual, to emergency access and may be designed to a P.01 grade of service or to a grade of service negotiated and agreed upon by the 9-1-1 Delivery Provider[3] and the 9-1-1 Service Provider[4]. Implementations of links 4a/b should be designed to support the overall end to end grade of service objectives. These interswitch facilities could be used by either a wired or wireless access implementation.

A concern of this group is that the vagaries of marketing forces driving technical solutions may not, however, satisfy the emergency access and public use expectations.

Therefore, this group recommends that, for further consideration, the standards bodies developing radio standards investigate the feasibility of specifying technical solutions or strategies to minimize blocking of wireless 9-1-1 calls, from the radio

[3] Owner or provisioner of the S/R and the delivery facilities
[4] Owner or provisioner of the PSAP

system side of the network. Examples of issues to consider on the radio side might include load shedding, forced handoffs where existing calls can be maintained, etc. Issues for the public safety community to consider might include to use of advanced features such as Automatic Call Distribution (ACD) and Voice Response Units (VRU) to minimize blocking during overload conditions.

3. 9-1-1 Call Priority

An originating 9-1-1 call should have priority over other non-emergency services calls. This priority should extend to placing the 9-1-1 call at the beginning of a queue for calls waiting to be placed, if no radio or network resources are available. Because of the unknown nature or importance of calls in progress (i.e., a call to a suicide hotline or a poison control center), this priority requirement should not be interpreted to mean preempting or "bumping" a call in progress.

4. User Location Information

The wireless system should have the ability to identify the location of a wireless terminal used to make a 9-1-1 call. This location information shall be used to: (1) route a 9-1-1 call to the proper PSAP, based on the location of the base station to which that wireless handset is communicating and (2) provide the location of a terminal to the public safety call taker. Due to the concerns, both technical and financial, expressed by manufacturers and potential wireless service providers, a migration path for caller location is proposed. This migration path would start with a requirement for the location of the base station to which that wireless handset was

communicating and progress towards the ability to locate an individual wireless handset in a three-dimensional environment, as location technology and the cost of implementing such a technology become attainable. Technological advancements have indicated that the future may provide public safety with the ability to receive a high level of location accuracy from a wireless device.

It is the recommendation of this group that the standards bodies developing radio standards investigate the feasibility of specifying technical solutions or strategies to implement economically feasible detailed location capabilities at the call origination position and to make those capabilities available as soon as possible. Consideration should be given to both rural and urban environmental locational challenges and determine if a minimum geographic location accuracy within 400 feet could be achieved both technically and economically. A much higher level of location accuracy should be considered in urban environments where it will be necessary to determine the precise location of a caller within a multi-story structure.

5. Re-ring/Call back

The wireless system should have the ability of the emergency services call taker to reconnect, or call back the wireless handset if the call is disconnected or terminated prior to the finalization of the event. It should be noted that the group agreed that this requirement assumes the handset can receive the call back.

6. Information Elements Required in SS7 or ISDN-like Signaling

Future implementations of wireless systems and 9-1-1 type systems should be capable of providing a minimum number of information elements to the PSAP. The elements may include:

- Call back number and the handset subscriber's name
- Location of call origination, as discussed in section 4
- Class of service (e.g., residence, business, etc.)
- Wireless provider's name and telephone number
- Priority of the caller (e.g., hospital, school, etc.)
- Routing information to direct the call to the proper PSAP (Primary and Secondary PSAP identifiers)
- Transfer numbers - separate numbers to allow hot-key transfer of calls to police, fire and ambulance

7. Telephone Devices for the Deaf (TDD) Access

The wireless system should allow disabled individuals to access emergency services through means other than traditional wireless voice handsets (i.e., a TDD-like data device for the hearing impaired, etc.). To facilitate this requirement, there should be TDD-capable wireless devices but this does not impose a requirement that all wireless devices be TDD-capable.

It should be noted that new wireless systems will have a digital data capability. This capability will allow wireless users to communicate via data, without the use of traditional voiceband facilities. This capability must be accommodated in the PSAP, in order to serve the widest universe of the public.

8. Future Requirements

This document raises the need for additional work on a number of details concerning requirements and needs for future emergency access. The FCC and standards bodies, among others, should develop or request the development of detailed requirements, cost analyses and possible solutions.

Appendix A

The Personal Communications Industry Association (PCIA), formerly Telocator, is a trade association representing more than 450 companies including PCS experimental licensees and entrepreneurs, paging, cellular, cable, manufacturing, computer, mobile data, SMR, local exchange and interexchange sectors of the industry.

Established in 1949, PCIA has been instrumental in advancing regulatory policies, legislation and technological standards that have helped make the communications revolution possible. One of PCIA's greatest strengths is its ability to foster and represent consensus in order to advance the interests of the wireless industry.

The Association of Public Safety Communications Officials-International, Inc. (APCO) is the world's oldest and largest not-for-profit professional organization dedicated to the enhancement of public safety communications. Members come from every type of public safety organization imaginable, from 9-1-1 centers and public safety departments which include police, fire, highway maintenance, corrections, forestry, emergency medical services and local government.

With more than 10,000 members worldwide, APCO International exists to serve the people who manage, operate, maintain and supply the communications systems used to safeguard the lives and property of citizens everywhere.

The National Emergency Number Association (NENA) was established in 1982 as a not-for-profit in order to further the goal of "One Nation...One Number." NENA's mission is to foster the technological advancement, availability and implementation of a universal emergency telephone number system. In carrying out its mission, NENA promotes research, planning, training and education. The protection of human life, the preservation of property, and the maintenance of general community security are among NENA's objectives.

The National Association of State Nine One One Administrators (NASNA) is an organization of state officials whose purpose includes:

- Promoting information sharing amongst those states with programs dedicated to implementing 9-1-1 emergency telephone systems;
- Assisting other states with resolving issues necessary to accomplish statewide implementation and maintenance;
- Encouraging the establishment of a coordination person within each state or province;
- Identifying and recommending minimum standards for 9-1-1 emergency telephone systems;
- Identifying and recommending appropriate legislation or rules concerning the administration of statewide 9-1-1 emergency telephone system programs and;
- Serving as a knowledge resource for fulfilling the purposes described herein.

Appendix B

9-1-1 Call Taker Feature Priority

This appendix identifies 9-1-1 call features currently available to many emergency call taking organizations, listed in order of importance as defined by NENA/APCO leadership. The availability of these features enables more timely arrival of public safety personnel, minimizing loss of life and property. The list is provided to promote a better understanding of call feature value as related to emergency response capability.

1. Ability to reach emergency services by dialing 9-1-1
2. Ability to permit call precedence for 9-1-1 over other call types
3. Ability to identify caller's geographic location
4. Ability to hear and determine the type of emergency services needed
5. Ability to receive 9-1-1 calls within their jurisdiction (Selective Routing)
6. Ability to detect and communicate with TDD and data callers
7. Ability to hold the line for trace, after the caller has disconnected (Called Party Hold), or the ability to call back
8. Ability to call the caller back after disconnection and/or perform re-ring with the called party held
9. Ability to transfer the caller to the appropriate PSAP
10. Ability to transfer the information screen to the appropriate PSAP
11. Ability to force disconnect, regardless of the caller switch hook status

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 26, 1994

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Calhoun County Broadcasting Co. (WJRL) - Request for exemption from payment of regulatory fees for an AM station at Calhoun City, Mississippi - **Granted** (September 7, 1994).

Pepper & Corazzini - Request for clarification of the PLMS regulatory fee calculations for various licensees in the PLMS Washington, DC - **Clarified** (August 23, 1994).

RAM Mobile Data USA LP - Request for waiver of Section 90.603(c) of the Commissions Rules, and request for partial refund of filing fees submitted in connection with an application for transfer of control at New York, New York - **Denied** (August 25, 1994).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202)418-1995.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

7 1994

Calhoun County Broadcasting Co.
C/O Mrs. Kathleen O. Williams
10569 Collierville Road
Collierville, TN 38017

Dear Mrs. Williams:

This is in response to your letter dated August 1, 1994, requesting that Radio Station WJRL-AM, Calhoun City, Mississippi, be exempt from payment of the regulatory fee for broadcast stations.

WJRL-AM was licensed to your deceased husband, Jesse R. Williams. Mr. Williams died on May 16, 1992. You state that because of his illness the station was dark for several years before his death, that the station was vandalized and its equipment was stolen or destroyed during this period, and that you lack the financial resources to reactivate the station. You also submitted the license renewal for Radio Station WJRL-AM to the Commission for cancellation.

Under these circumstances, your request will be granted and the Commission will waive the regulatory fee for Radio Station WJRL-AM.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

AUG 2 3 1994

OFFICE OF
MANAGING DIRECTOR

Ellen S. Mandell, Esq.
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

Dear Ms. Mandell:

This is in response to the Request for Clarification filed August 12, 1994, on behalf of your clients who are licensees in the Public Land Mobile Service (PLMS). In the request, you ask the Commission to determine if the PLMS regulatory fee calculations should be based on $60.00 per 1000 subscribers or .06 per subscriber, and whether the fee calculations should use an exact subscriber count, which should also include customers of resellers.

47 C.F.R. § 1.1154 provides that the regulatory fee for PLMS licensees is $60 per 1000 subscribers. However, Appendix B of the Report and Order, Docket No. 94-19, FCC 94-140 (June 8, 1994), ¶ 33, provided that the rules would be interpreted so that "each common carrier licensee authorized under part 22 will be assessed an annual regulatory fee of $.06 per subscriber." Thus, to the extent possible, PLMS licensees should base their fee calculations on an exact count of their subscribers at the prescribed rate of $.06 for each subscriber.

The Report and Order, at ¶ 88, defines a subscriber "as an individual or entity authorized by a mobile service provider to operate under its blanket license in exchange for monetary consideration." Resellers commonly obtain mobile telephone numbers from licensees for the purpose of reselling the service to their own customers. Thus, resellers obtain service under the provider's license in exchange for monetary consideration, and they are counted as subscribers. However, we agree that, customers of resellers, who do not pay the licensee and have no direct relationship to the licensee, are not subscribers, and should not be included as subscribers for regulatory fee purposes.

If you have any further questions concerning the PLMS fees, please call the Chief, Fee Section at (202) 418-1995.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

AUG 2 5 1994

Mr. Steven T. Apicella
Vice President
RAM Mobile Data
745 Fifth Avenue
Suite 1900
New York, N.Y. 10151

Dear Mr. Apicella:

This is in response to your request for a partial refund of fees paid by RAM Mobile Data (RAM) in connection with its application for authority to transfer control of RAM to BellSouth Enterprises, Inc.(BSE) and an associated request for waiver of Section 90.603(c) of the Commission's Rules.

RAM has paid $232,575 in filing fees to cover the applications for transfer of its licenses to BSE and for a waiver of Section 90.603(c) to authorize BSE, as a wire line carrier, to hold Land-Mobile Radio licenses.[1] You maintain that the questions concerning the transfer of the licenses are not related to the number of call signs licensed to RAM, and that because the parties are only seeking a transfer of control, there is no need to reissue licenses or make other per license changes. You also state that the waiver request involves a request for authority for BSE to have a controlling interest in RAM, and does not affect or modify the operation of any of RAM's licensed facilities. In this regard, you note that the RAM/BSE waiver request is being considered in conjunction with similar requests for waiver of the same rule filed by five other companies.

You propose that the amount of RAM's application filing fees should be based on the number of its Designated Filing Areas rather than on the number of licenses held. In support of your request, you cite a number of precedents where the Commission reduced the filing fees.[2] You also conclude that

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[1] Ram paid a filing fee of $35 each for the transfer of 1823 applications or a total of $63,805 plus $105 for its waiver request. RAM subsequently reduced the number of licenses it held, and it paid a $105 waiver application fee for 1606 applications or $168,630. RAM also paid a separate fee of $35 for the assignment of its experimental license KI2XIJ.

[2] Letter to Peter Tannenwald, dated April 16, 1990; Letter to Robert A. Mazer dated April 16, 1990; Letter to Gerald S. McGowan dated September 29, 1989; and Letter to David G. Richards dated April 3, 1989.

because the only issue before the Commission is a waiver of a single rule, which is being considered in conjunction with other and similar waiver requests, that either no filing fee, or only a single $105 filing fee should be required for the waiver applications.

The Commission "may waive . . . payment of charges in any specific instance of good cause shown, where such action would promote the public interest." 47 U.S.C. § 158(d)(2); see also 47 C.F.R. § 1.1115(a). However, Congress specifically admonished the Commission to construe its waiver authority "narrowly." See Conference Report to accompany H.R. No. 453, 99th Cong., 1st Sess. 423 (1985). Congress also recognized "that some minimum fee is necessary to ensure that the costs of collecting the fee do not exceed the potential revenues from the fee" and it set the minimum fee at $35. Conference Report to accompany H.R. 3299, 101st Cong., 1st Sess. 434 (1989). Subsequent to the precedents referenced by RAM, Congress sought to eliminate inequitable fee requirements for processing multiple applications by establishing a two-tiered fee structure in those instances where essentially duplicative, ministerial processing tasks are likely to occur, once action on the "lead" application was completed. Examples of where Congress provided relief for multiple filings can be found at 47 U.S.C. § 8 (2)(e), (3)(e), (4)(e), (6)(e), (7)(e), (8)(e), (10)(e), (11)(e) and (12)(e). Congress, however, did not include applications for transfer of control of Land-Mobile Radio Stations in that class of license where multiple filings would warrant reduced filing fees.

The Commission adopted the Schedule of Fees, including the fees for Land Mobile Radio Station licenses, as enacted by Congress. The Schedule of Charges resulted from a determination by the Congress that the fees represent a fair approximation as to how the Commission's costs should be distributed. Conference Report to accompany H.R. 3299, H.R. Rep. No. 386, 101st Cong., 1st Sess. 20-28, 433 (1989); Establishment of Fee Collection Program, 5 FCC Rcd 3558, 3574 (1990). Therefore, we cannot waive or reduce the fees paid by RAM for assignment of its Land-Mobile licenses because Congress has already established the appropriate fee for those applications. Congress afforded the public ample opportunity to comment on the proposed fee schedule before it was enacted. While the Commission has reduced fees for multiple applications in the past, these reductions occurred prior to Congress's recent and specific revision of the fee schedule and are thus not relevant here. RAM is not entitled, therefore, to a waiver or reduction of its application filing fees.

RAM has also asked for a waiver or reduction of the fees it paid for filing its request for waiver of Section 90.603(c). RAM's request that waiver requests be assessed a single $105 fee or no fee, regardless of the number of stations involved, is also inconsistent with congressional intent. Congress specifically provided that for non-routine waiver requests, filing fees would be required "per

rule section/per station." 47 U.S.C. § 8(6). The legislative history explicitly explains that non-routine waivers "involve more than one rule section or station." Separate floor statement by Congressman Dingell, 135 Cong. Rec. H9610 at 5(a)(1989) and Senator Hollings, 135 Cong. Rec. S16640 at 5(a) (1989). Thus, waivers involving more than one station are considered as "non-routine" waivers requiring the payment of a separate filing fee for each station. Establishment of a Fee Collection Program, 6 FCC Rcd 5919, 5925-25 ¶¶ 49-50 (1991).

Accordingly, your request for a waiver or reduction of filing fees is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

DA 94-497

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

May 17, 1994

AREAS OF DOMINANT INFLUENCE (ADIs) AND ASSOCIATED METROPOLITAN STATISTICAL AREAS (MSAs) [IVDS AREAS #1-306]

In the Fourth Report and Order in PP Docket No. 93-253 the Commission established rules and procedures for auctioning licenses in the Interactive Video and Data Service (IVDS). The Commission stated in that item that it intended to auction licenses for IVDS areas corresponding to Metropolitan Statistical Areas (MSAs) first using an oral outcry auction. MSAs correspond exactly to IVDS areas 1-306. Licenses for these IVDS areas will be offered in ADI order, rather than numerical order by service area number. For each ADI the lowest numbered IVDS area in the ADI will be auctioned first and then the Commission will go in numerical order until all the IVDS areas below 306 in that ADI are auctioned. The IVDS areas associated with the ADIs where the primary service area was lotteried will also be auctioned in this way.

The Commission noted that it would issue a Public Notice listing the pertinent ADIs and the IVDS areas to be auctioned in each ADI. Attached is a listing of ADIs and all associated IVDS areas from 1-306, including the service area numbers. [Note: The Commission has already granted licenses for IVDS areas #1, 2, 3, 4, 6, 7, 8, 9, and 10. Further, applicants should be aware that there may be licensing delays and/or additional restrictions placed on IVDS areas located along the US/Canadian and US/Mexican borders. The areas along the border are IVDS areas 5, 16, 18, 20, 25, 34, 48, 53, 77, 81, 128, 130, 136, 141, 162, 248, 270, 281, 285 and 306.] If the ADI did not have a IVDS area between 1 and 306 associated with it, the ADI was not listed. For our purposes here we have also included four additional groups (#211-214) to cover IVDS areas not associated with the 210 ADIs developed by Arbitron Ratings Company.

For further information on auctions contact the FCC Auctions Hotline at (202) 418-1400. For further information on this Public Notice contact Joy Alford at (202) 632-4964.

Areas of Dominant Influence (ADI) and Associated Metropolitan Statistical Areas [IVDS service areas 1-306]

1 New York, NY

# 1	New York, NY-NJ	(Previously Lotteried)
# 42	Bridgeport-Stamford-Norwalk-Danbury, CT	
# 62	New Brunswick-Perth Amboy-Sayreville, NJ	
# 70	Long Branch-Asbury Park, NJ	
# 144	Orange County, NY	
# 151	Poughkeepsie, NY	

2 Los Angeles, CA

# 2	Los Angeles, CA	(Previously Lotteried)
# 73	Ventura, CA	

3 Chicago, IL

# 3	Chicago. IL	(Previously Lotteried)
# 54	Gary-Hammond-East Chicago, IN	
# 273	Kankakee, IL	
# 303	Aurora-Elgin, IL	
# 304	Joliet, IL	

4 Philadelphia, PA

# 4	Philadelphia, PA	(Previously Lotteried)
# 58	Allentown-Bethlehem-Easton, PA-NJ	
# 69	Wilmington, DE-NJ-MD	
# 118	Reading, PA	
# 121	Trenton, NJ	
# 134	Atlantic City-Cape May, NJ	
# 228	Vineland-Millville-Bridgeton, NJ	

5 San Francisco-Oakland-San Jose, CA

# 7	San Francisco-Oakland, CA	(Previously Lotteried)
# 27	San Jose, CA	
# 111	Vallejo-Fairfield-Napa, CA	
# 123	Santa Rosa-Petaluma, CA	

6 Boston, MA

# 6	Boston, MA	(Previously Lotteried)

	# 55	Worchester-Fitchburg-Leominster, MA	
	# 133	Manchester-Nashua, NH	
7	Washington, DC		
	# 8	Washington, DC	(Previously Lotteried)
	# 269	Cumberland, MD-WV	
8	Dallas-Fort Worth, TX		
	# 9	Dallas-Fort Worth, TX	(Previously Lotteried)
	# 292	Sherman-Denison, TX	
9	Detroit, MI		
	# 5	Detroit/Ann Arbor, MI	(Border)
10	Atlanta, GA		
	# 17	Atlanta, GA	
11	Houston, TX		
	# 10	Houston, TX	(Previously Lotteried)
	# 170	Galveston - Texas City, TX	
12	Cleveland, OH		
	# 16	Cleveland, OH	(Border)
	# 52	Akron, OH	
	# 87	Canton, OH	
	# 136	Lorian-Elyria, OH	(Border)
	# 231	Mansfield, OH	
13	Minneapolis-St. Paul, MN		
	# 15	Minneapolis-St. Paul, MN	
	# 198	St. Cloud, MN	
14	Seattle-Tacoma, WA		
	# 20	Seattle-Everett, WA	(Border)
	# 82	Tacoma, WA	
	# 212	Bremerton, WA	
	# 242	Olympia, WA	
	# 270	Bellingham, WA	(Border)
15	Miami-Fort Lauderdale, FL		
	# 12	Miami-Fort Lauderdale-Hollywood, FL	
16	Tampa-St. Petersburg, FL		
	# 22	Tampa-St. Petersburg, FL	

114 Lakeland-Winter Haven, FL

211 Bradenton, FL

17 Pittsburgh, PA

13 Pittsburgh, PA

18 St. Louis, MO

11 St. Louis, MO

305 Alton-Granite City, IL

19 Sacramento-Stockton, CA

35 Sacramento, CA

107 Stockton, CA

142 Modesto, CA

274 Yuba City, CA

20 Phoenix, AZ

26 Phoenix, AZ

21 Denver, CO

19 Denver-Boulder, CO

210 Fort Collins-Loveland, CO

243 Greeley, CO

22 Baltimore, MD

14 Baltimore, MD

23 Orlando-Daytona Beach-Melbourne, FL

60 Orlando, FL

137 Melbourne-Titusville-Palm Bay, FL

146 Daytona Beach, Florida

245 Ocala, FL

24 Hartford-New Haven, CT

32 Hartford-New Britain-Bristol, CT

49 New Haven-West Haven-Waterbury-Meriden, CT

154 New London-Norwich, CT

25 San Diego, CA

18 San Diego, CA (Border)

26 Indianapolis, IN

28 Indianapolis, IN

217 Anderson, IN

236 Muncie, IN

271 Kokomo, IN

282 Bloomington, IN

27 Portland, OR

30 Portland, OR-WA

148 Salem, OR

28 Milwaukee, WI

21 Milwaukee, WI

189 Racine, WI

244 Kenosha, WI

277 Sheboyan, WI

29 Kansas City, MO

24 Kansas City, MO-KS

301 Lawrence, KS

30 Cincinnati, OH

23 Cincinnati, OH

145 Hamilton-Middletown, OH

31 Charlotte, NC

61 Charlotte-Gastonia, NC

166 Hickory, NC

32 Raleigh-Durham, NC

71 Raleigh-Durham, NC

149 Fayetteville, NC

33 Nashville, TN

46 Nashville-Davidson, TN

209 Clarksville-Hopkinsville, TN-KY

34 Columbus, OH

31 Columbus, OH

35 Greenville-Spartanburg, SC-Asheville, NC

67 Greenville-Spartanburg, SC

183 Asheville, NC

227 Anderson, SC

234 Athens, GA

36 Buffalo, NY

25 Buffalo, NY (Border)

37 Grand Rapids-Kalamazoo-Battle Creek, MI
- # 64 Grand Rapids, MI
- # 132 Kalamazoo, MI
- # 177 Battle Creek, MI
- # 181 Muskegon, MI

38 Norfolk-Portsmouth-Newport News-Hampton, VA
- # 43 Norfolk-Virginia Beach-Portsmouth, VA/NC
- # 104 Newport News-Hampton, VA

39 Memphis, TN
- # 36 Memphis, TN-AR-MS

40 New Orleans, LA
- # 29 New Orleans, LA
- # 184 Houma-Thibodaux, LA

41 San Antonio, TX
- # 33 San Antonio, TX

42 Salt Lake City, UT
- # 39 Salt Lake City-Ogden, UT
- # 159 Provo-Orem, UT

43 Providence, RI-New Bedford, MA
- # 38 Providence-Warwick-Pawtuctet, RI
- # 76 New Bedford-Fall River, MA

44 Oklahoma City, OK
- # 45 Oklahoma City, OK
- # 302 Enid, OK

45 Louisville, KY
- # 37 Louisville, KY-IN

46 West Palm Beach-Ft. Pierce-Vero Beach, FL
- # 72 West Palm Beach-Boca Raton, FL
- # 208 Fort Pierce, FL

47 Harrisburg-York-Lancaster-Lebanon, PA
- # 84 Harrisburg, PA
- # 99 York, PA
- # 105 Lancaster, PA

48 Greensboro-Winston-Salem-High Point, NC
- # 47 Greensboro-Winston-Salem-High Point, NC
- # 280 Burlington, NC

49 Wilke-Barre-Scranton, PA
- # 56 Northeast Pennsylvania, PA
- # 251 Williamsport, PA

50 Birmingham, AL
- # 41 Birmingham, AL
- # 272 Gadsden, AL

51 Albany-Schenectady-Troy, NY
- # 44 Albany-Schenectady-Troy, NY
- # 213 Pittsfield, MA
- # 266 Glen Falls, NY

52 Albuquerque, NM
- # 86 Albuquerque, NM

53 Dayton, OH
- # 40 Dayton, OH
- # 180 Springfield, OH

54 Jacksonville. FL
- # 51 Jacksonville. FL

55 Charleston-Huntington, WV
- # 110 Huntington-Ashland, WV/KY/OH
- # 140 Charleston, WV

56 Flint-Saginaw-Bay City, MI
- # 68 Flint, MI
- # 94 Saginaw-Bay City-Midland, MI

57 Little Rock, AR
- # 92 Little Rock-North Little Rock, AR
- # 291 Pine Bluff, AR

58 Tulsa, OK
- # 57 Tulsa, OK

59 Fresno-Visalia, CA
- # 74 Fresno, CA
- # 150 Visalia-Tulare-Porterville, CA

60 Richmond, VA
- # 59 Richmond, VA
- # 235 Petersburg-Colonial Heights, VA

61 Wichita-Hutchinson, KS
- # 89 Wichita, KS

62 Knoxville, TN
- # 79 Knoxville, TN

63 Mobile, AL - Pensacola, FL
- # 83 Mobile, AL
- # 127 Pensacola, FL
- # 265 Fort Walton Beach, FL

64 Toledo, OH
- # 48 Toledo, OH-MI (Border)

65 Roanoke-Lynchburg, VA
- # 157 Roanoke, VA
- # 203 Lynchburg, VA
- # 262 Danville, VA

66 Syracuse, NY
- # 53 Syracuse, NY (Border)

67 Green Bay-Appleton, WI
- # 125 Appleton-Oskosh-Neenah, WI
- # 186 Green Bay, WI

68 Austin, TX
- # 75 Austin, TX

69 Portland-Poland Spring, ME
- # 152 Portland, ME
- # 156 Portsmouth-Dover-Rochester, NH-ME
- # 279 Lewiston-Auburn, ME

70 Des Moines, IA
- # 102 Des Moines, IA

71 Shreveport, LA-Texarkana, AR-TX
- # 100 Shreveport, LA
- # 240 Texarakana, TX - Texarkana, AR

72 Rochester, NY

34 Rochester, NY (Border)

73 Omaha, NE
65 Omaha, NE-IA

74 Lexington, KY
116 Lexington-Fayette, KY

76 Springfield-Decatur-Champaign, IL
176 Springfield, IL
196 Champaign-Urbana-Rantoul, IL
230 Decatur, IL

77 Springfield, MO
163 Springfield, MO

78 Tucson, AZ
77 Tuscon, AZ (Border)

79 Las Vegas, NV
93 Las Vegas, NV

80 Spokane, WA
109 Spokane, WA

81 Chattanooga, TN
88 Chattanooga, TN-GA

82 Cedar Rapids-Waterloo-Dubuque, IA
195 Cedar Rapids, IA
201 Waterloo-Cedar Falls, IA
286 Dubuque, IA
296 Iowa City, IA

83 Davenport, IA-Rock Island-Moline, IL
98 Davenport-Rock Island-Moline, IA/IL

83 Johnstown-Altoona, PA
143 Johnstown, PA
225 Altoona, PA
259 State College, PA

85 Bristol, VA-Kingsport-Johnson City, TN
85 Johnson City-Kingsport-Bristol, TN-VA

86 South Bend-Elkhart, IN
129 South Bend-Mishawaka, IN

193 Benton Harbor, MI

223 Elkhart-Goshen, IN

87 Columbia, SC

95 Columbia, SC

88 Huntsville-Decatur-Florence, AL

120 Huntsville, AL

226 Florence, AL

89 Jackson, MS

106 Jackson, MS

90 Fort Myers-Naples, FL

164 Fort Myers, FL

91 Youngstown, OH

66 Youngstown-Warren, OH

238 Sharon, PA

92 Madison, WI

113 Madison, WI

216 Janesville-Beloit, WI

93 Evansville, IN

119 Evansville, IN/KY

293 Owensboro, KY

94 Waco-Temple-Bryan, TX

160 Killeen-Temple, TX

194 Waco, TX

287 Bryan-College Station, TX

95 Baton Rouge, LA

80 Baton Rouge, LA

96 Springfield, MA

63 Springfield-Chicopee-Holyoke, MA

97 Burlington, VT-Plattsburgh, NY

248 Burlington, VT (Border)

98 Lincoln-Hastings-Kearney, NE

172 Lincoln, NE

99 Colorado Springs-Pueblo, CO

117 Colorado Springs, CO

241 Pueblo, CO

100 El Paso, TX
81 El Paso, TX (Border)
285 Las Cruces, NM (Border)

101 Savannah, GA
155 Savannah, GA

102 Fort Wayne, IN
96 Fort Wayne, IN

103 Lansing, MI
78 Lansing-East Lansing, MI
207 Jackson, MI

104 Greenville-New Bern-Washington, NC
258 Jacksonville, NC

105 Charleston, SC
90 Charleston-North Charleston, SC

106 Sioux Falls-Mitchell, SD
267 Sioux Falls, SD

107 Peoria-Bloomington, IL
103 Peoria, IL
250 Bloomington-Normal, IL

108 Fargo, ND
221 Fargo-Moorehead, ND-MN
276 Grand Forks, ND-MN

109 Santa Barbara-Santa Maria-San Luis Obispo, CA
124 Santa Barbara-Santa Maria-Lompoc, CA

110 Montgomery-Selma, AL
139 Montgomery, AL

111 Salinas-Monterey, CA
126 Salina-Seaside-Monterey, CA
#-175 Santa Cruz, CA

112 Augusta, GA
108 Augusta, GA/SC

113 Tyler-Longview-Jacksonville, TX
206 Longview-Marshall, TX

237 Tyler, TX

114 McAllen-Brownsville, TX
128 McAllen-Edinburg-Mission, TX (Border)
162 Brownsville-Harlingen, TX (Border)

115 Tallahassee, FL-Thomasville, GA
168 Tallahassee, FL

116 Reno, NV
171 Reno, NV

117 Eugene, OR
135 Eugene-Springfield, OR

118 Fort Smith, AK
165 Fort Smith, AK-OK
182 Fayetteville-Springdale, AK

119 Lafayette, LA
174 Lafayette, LA

120 Macon, GA
138 Macon-Warner Robins, GA

121 Columbus, GA
153 Columbus, GA-AL

123 La Crosse-Eau Claire, WI
232 Eau Claire, WI
290 La Crosse, WI

125 Corpus Christi, TX
112 Corpus Christi, TX

126 Duluth, MN-Superior, WI
141 Duluth, MN-WI (Border)

127 Amarillo, TX
188 Amarillo, TX

128 Monroe, LA-El Dorado, AR
219 Monroe, LA

129 Yakima-Pasco-Richland-Kennewick, WA
191 Yakima, WA
214 Richland-Kennewick-Pasco, WA

130 Chico-Redding, CA
215 Chico, CA
254 Redding, CA

131 Wausau-Rhinelander, WI
263 Wausau, WI

132 Bakersfield, CA
97 Bakersfield, CA

133 Binghamton, NY
122 Binghamton, NY

134 Beaumont-Port Arthur, TX
101 Beaumont-Port Arthur, TX

135 Rockford, IL
131 Rockford, IL

136 Terre Haute, IN
185 Terre Haute, IN

137 Sioux City, IA
253 Sioux City, IA-NE

138 Florence-Myrtle Beach, SC
264 Florence, SC

139 Wichita Falls, TX-Lawton, TX
233 Wichita Falls, TX
260 Lawton, OK

140 Erie, PA
130 Erie, PA (Border)

141 Topeka, KS
179 Topeka, KS

142 Boise, ID
190 Boise City, ID

143 Wilmington, NC
218 Wilmington, NC

144 Wheeling, WV-Steubenville, OH
178 Wheeling, WV-OH
199 Steubenville-Weirton, OH-WV

145 Joplin, MO-Pittsburg, KS
239 Joplin, MO

147 Lubbock, TX
161 Lubbock, TX

148 Rochester, MN-Mason, IA-Austin, MN
288 Rochester, MN

149 Medford, OR
229 Medford, OR

149 Minot-Bismarck-Dickinson, ND-Glendive, MT
298 Bismarck, ND

151 Odessa-Midland, TX
255 Odessa, TX
295 Midland, TX

152 Columbia-Jefferson City, MO
278 Columbia, MO

153 Albany, GA
261 Albany, GA

154 Sarasota, FL
167 Sarasota, FL

155 Bangor, ME
224 Bangor, ME

157 Abilene-Sweetwater, TX
220 Abilene, TX

158 Biloxi-Gulfport-Pascagoula, MS
173 Biloxi-Gulfport, MS
252 Pascagoula, MS

161 Utica, NY
115 Utica-Rome, NY

162 Panama City, FL
283 Panama City, FL

165 Gainesville. FL
192 Gainesville, FL

166 Dothan, AL

246 Dothan, AL

169 Elmira, NY
284 Elmira, NY

171 Rapid City, SD
289 Rapid City, SD

172 Billings-Hardin, MT
268 Billings, MT

173 Alexandria, LA
205 Alexandria, LA

174 Lake Charles, LA
197 Lake Charles, LA

182 Great Falls, MT
297 Great Falls, MT

184 Parkersburg, WV
200 Parkersburg-Marietta, OH-WV

185 Tuscaloosa, AL
222 Tuscaloosa, AL

188 San Angelo, TX
294 San Angelo, TX

189 St. Joseph, MO
275 St. Joseph, MO

192 Hagerstown, MD
257 Hagerstown, MD

193 Lafayette, IN
247 Lafayette, IN

194 Anniston, AL
249 Anniston, AL

196 Charlottesville, VA
256 Charlottesville, VA

197 Casper-Riverton, WY
299 Casper, WY

198 Lima, OH
158 Lima, OH

199 Laredo, TX
281 Laredo, TX (Border)

207 Victoria, TX
300 Victoria, TX

211 Hawaii
50 Honolulu, HI

212 Alaska
187 Anchorage, AK

213 Puerto Rico
91 San Juan-Caguas, PR
147 Ponce, PR
169 Mayaguez, PR
202 Arecibo, PR
204 Aguadilla, PR

214 Others
306 Gulf of Mexico (Border)

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
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DA 94-1016

September 20, 1994

Microwave radio assignments above 806 MHz contained in the Federal Communictions Commission's Master Frequency File (XFS) now available on Internet

The FCC's Office of Engineering and Technology (OET) is releasing: (a) an extract of microwave radio assignments on frequencies above 806 MHz residing in the Commission's *Master Frequency File* (*XFS*) in the *Enhanced Microwave Environmental Link File* (*EMELF*) format; (b) documentation describing the *EMELF* format; and (c) an extraction program, *CnvEmelf*, which can be used to read the assignment data in the *EMELF* format and convert the data into a format suitable for importation into a data base management program.

Also being released is the program *LinkMap* which allows the user to plot telecommunications facilities on various types of maps (e.g., maps containing political boundaries, highways, railroads, waterways, *etc.*). The resulting plots can be displayed and/or edited using WordPerfect Corporation's DrawPerfect (v1.1), Presentations (v2.0), or the Draw feature of WordPerfect 6.0 for Windows.[1] If editing of map images is not required, the graphic files can be imported directly into WordPerfect 5.1/5.2/6.0 for DOS/Windows.

OET intends to release the *EMELF* data base on a quarterly basis (first of January, April, July, and October) or as needed, and to provide updates of the associated software as conditions require.

EMELF Data Base

The EMELF data being released was extracted from the *Master Frequency File* (*XFS*) on July 1, 1994. The EMELF files are available for down loading from the FCC's Anonymous FTP site (ftp.fcc.gov) in the directory "/pub/Spectrum_Management/Data/EMELF/". The table below lists the files from the July extract and their sizes (un-compressed and compressed). It should be noted that the assignment data is extracted from the XFS data base by underlying data base. The division of the data

[1] Other draw/presentation software that can process WordPerfect WPG vector files can be used to make these edits.

between files listed below is determined by the file handing capability of the extraction software and computer hardware, and not by the underlying data base or frequency order.

File Name	Approximate File Size (kbytes)	Approximate Compressed File Size (kbytes)
x940701a.dat (ZIP)	115,656	6,298
x940701b.dat (ZIP)	116,751	4,338
x940701c.dat (ZIP)	116,911	4,529
x940701d.dat (ZIP)	116,593	5,110
x940701e.dat (ZIP)	114,996	4,226
x940701f.dat (ZIP)	116,796	5,890
x940701g.dat (ZIP)	33,702	1,949

EMELF Documentation and CnvEmelf Program

The *EMELF* documentation along with *CnvEmelf* program and its associated documentation is available for down loading from the FCC's Anonymous FTP site (ftp.fcc.gov) in the directory "/pub/Spectrum_Management/Data/EMELF/".

File Name	Description	Approximate File Size (kbytes)	Approximate Compressed Size (kbytes)
Emelf01.zip	A compressed file in the ZIP format which contains the following files:		137
Packing.lst	An ASCII listing of the contents of Emelf01.zip	1	
EmelfStr.doc	A WordPerfect v5.2 document which describes the file structure of an Enhanced Microwave Environmental Link File (EMELF).	126	
CnvEmelf.doc	A WordPerfect v5.2 document which describes the operation of the program CnvEmelf.	82	
CnvEmelf.bas	A QuickBASIC (v4.5) program which converts EMELF data into a flat ASCII format suitable for use by the program LinkMap	66	

File Name	Description	Approximate File Size (kbytes)	Approximate Compressed Size (kbytes)
CnvEmelf.exe	The executable version.	41	
CnvEmelf.ini	The initialization file containing the sub-directory location for the input, output and report files.	83 bytes	
brun45.exe	The QuickBASIC runtime module is needed to run executable version of CnvEmelf. It must be located in the same directory as CnvEmelf.exe or the MS-DOS path statement must point to it.	77	
Regstrtn.frm	Program and documentation registration form.	1	

LinkMap Program

The *LinkMap* program, documentation and associated data files are available for down loading from the FCC's Anonymous site (ftp.fcc.gov) in the directory "/pub/Spectrum_Management/Software/LinkMap/".

Documentation, Program and Data Files

File Name	Description	Approximate File Size (kbytes)	Approximate Compressed File Size (kbytes)
LM01.zip	A compressed file in the ZIP format which contains the following files:		342
LinkMap.doc	LinkMap documentation in WordPerfect 5.2 format.	382	
Lm.bas	LM.bas is the front-end engine that creates the file "LmScript.fil" which contains the parameters needed by the extraction and plotting engine to create the map images.	84	
Lm.exe	The executable version of "Lm.bas".	57	
Lm{Ovl}.bas	This extraction and plotting engine does the actual extraction of the link parameters needed to plot the link and creates the vector image in WPG format.	164	

File Name	Description	Approximate File Size (kbytes)	Approximate Compressed File Size (kbytes)
Lm{ovl}.exe	The executable version "Lm{ovl}.bas".	64	
BandFile.dat	This file contains data on frequency bands which can be accessed by this program, i.e., input file names, ranges, *etc.*	3	
MsaLctn.dat	This file contains coordinate and rank data on the top 50 Metropolitan Statistical Areas (MSA)/ Consolidated Metropolitan Statistical Areas (CMSA). The coordinates are based on the coordinates found in Section 76.53 of the Commission's Rules and Regulations for these 50 locations.	3	
Lm.ini	This file contains program initialization information (*i.e.*, path to files).	129 (bytes)	
MapFile.dat	This file identifies the name and location of map data files to be used, and whether or not the file is a sequential or random access file.	14	
packing.lst	An ASCII listing of the contents of LM01.zip.	1	
regstrtn.frm	Program and documentation registration form.	1	
brum45.exe	The QuickBASIC runtime module is needed to run executable version of LinkMap. It must be located in the same directory as LinkMap or the MS-DOS path statement must point to it.	77	

Associated Map Data Files

File Name	Description	Approximate File Size (kbytes)	Approximate Compressed File Size (kbytes)
MapData.zip	A compressed file in the ZIP format which contains the following files:-		234
citybox.map	This file contains data used to draw boxes around selected MSA/CMSA's.	20	

conus.map	Digital Line Graphic (DLG) data which defines the political boundaries of the contiguous United States of America and the several states.	244	
conusgrd.map	This file contains data used to draw 1 degree longitude and latitude lines over CONUS.	6	
wdb_fcc.map	FCC DLG data defining the world political boundaries.	194	

Please Note:

(1) The data bases, programs, and related documentation files discussed in this *Public Notice* are available only from the FCC via Internet from the Commission's Anonymous FTP site (ftp.fcc.gov).

(2) All documentation is in WordPerfect 5.1/5.2 format.

(3) All documentation, program, and data files have been compressed in the ZIP format. The files can be uncompressed using either the GNU public domain ZIP program[2] or the commercial PkUnZip program.[3]

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[2] The GNU public domain ZIP compression program can be down loaded from the anonymous ftp site, "prep.ai.mit.edu" (18.71.0.38) in the directory "pub/gnu". The executable program is "gzip-1.2.4.msdos.exe" and the associated documentation and C source code is in the file "gzip-1.2.4.shar" (ascii) or "gzip-1.2.4.tar" (tar). GZIP can compress and un-compress files in the ZIP format.

[3] PKZIP, version 2.04g, is a compression program that can be found on many computer bulletin board systems (BBS) and requires the payment of a registration fee or can be ordered directly from PKware, Inc. • 9025 N. Deerwood Drive• Brown Deer, WI 53223 / ☎ +1 (414) 354-8699 / Fax: +1 (414) 354-8559.

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— FCC —

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
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RELEASED: September 22, 1994

INTERACTIVE VIDEO AND DATA SERVICE (IVDS) APPLICATIONS ACCEPTED FOR FILING

On July 28 and 29, 1994, the Federal Communications Commission held an oral outcry auction for 594 IVDS licenses covering 297 markets. Winning bidders were required to file the appropriate down payment on or before August 8, 1994, and to submit FCC Form 574 and related showings on or before August 15, 1994. Currently, 460 applications for IVDS licenses have been accepted for filing (e.g., met both the down payment and 574 filing requirements). Future Public Notices will list the status of remaining applications after completion of further staff review.

As indicated in Section 1.972(d) of the Commission's Rules, the Commission will grant authorizations to those winning bidders whose applications have been accepted for filing and that are determined to be qualified to receive licenses under 47 C.F.R. Part 95, Subpart F of the Rules. For further information, contact the Consumer Assistance Branch at 1-800-322-1117.

A listing of the IVDS applications that have been accepted for filing is attached, along with an index of market numbers and locations.

- FCC -

IVDS APPLICATIONS ACCEPTED FOR FILING

File No.	Applicant	Market No.	Frequency Block
840019	Interactive Video and Data Networks, Inc.	5	B
840020	IVDS Auction Consortium Limited Partnership	11	B
840021	Panamerican Interactive Corporation	12	B
840022	Whitehall Wireless Corporation	14	B
840023	IVDS Interactive Acquisition Partners	15	B
840024	KMC Interactive TV, Inc.	16	A
840025	WCI Partners	16	B
840026	IVDS Interactive Acquisition Partners	17	B
840027	IVDS Enterprises Joint Ventures	19	B
840028	Washington Communications, Inc.	20	B
840029	Interactive Innovations, Inc.	21	B
840030	IVDS Enterprises Joint Ventures	23	A
840031	Shaker IVDS Partners	23	B
840032	IVDS Interactive Acquisition Partners	24	B
840033	Joann Hartley	25	A
840034	KMC Interactive TV, Inc.	25	B
840035	Harinder Kumra	27	B
840036	Gulfnet Communications, Inc.	29	A
840037	Interactive Partners of America	29	B
840038	IGGW Interactive Inc.	30	B
840039	Carl Davis	31	A
840040	WBNS-TV, Inc.	31	B
840041	Loli, Inc.	32	A
840042	Friends of IVDS	32	B
840043	Two Way TV Inc.	33	B
840044	Maria Magnus	34	A
840045	Loli, Inc.	34	B
840046	IVDS Auction Consortium Limited Partnership	35	B
840047	Eagle Interactive Partners, LP	37	A
840048	Elleron Telecommunications Corp.	37	B
840049	IVDS/RLV Partnership	38	A
840050	M&B XXXIX, Inc.	38	B
840051	NAB-IVDS Group, Inc.	39	A
840052	Carl Davis	40	A
840053	Mager Investment Corp.	40	B
840054	Elleron Telecommunications Corp.	41	A
840055	Eagle Interactive Partners, LP	41	B
840056	Tele-Link Communications, Inc.	42	A
840057	Loli, Inc.	42	B
840058	Community Teleplay, Inc.	43	B
840059	Prime Time Networks Corporation	44	A
840060	1st ITV Partners I	44	B
840061	MKS Interactive, Inc.	47	B
840062	Welch Communications, Inc.	48	A
840063	MKS Interactive, Inc.	48	B
840064	21st Century Interactive Partnership	49	B
840065	American Interactive West Inc.	50	B
840066	Remote Vision Interactive, Inc.	52	B
840067	Loli, Inc.	53	A

File No.	Applicant	Market No.	Frequency Block
840068	B & C Communication Service	53	B
840069	Self Communications, Inc.	54	A
840070	Daniel Rivera Sr.	55	A
840071	Friends of IVDS	55	B
840072	Pegasus IVDS, Inc.	56	B
840073	Elleron Telecommunications Corp.	57	B
840074	Erwin Aguayo Jr.	58	A
840075	Kingdon Hughes	58	B
840076	One Number Information Systems, Inc.	59	B
840077	Interactive Control Two, Inc.	62	A
840078	Daniel Rivera Sr.	63	A
840079	Friends of IVDS	63	B
840080	Progressive Communications	64	A
840081	21st Century Interactive Partnership	64	B
840082	Inter-American Communications, Inc.	65	A
840083	IGGW Interactive Inc.	65	B
840084	Windgate Fund, LLC268205	66	A
840085	Shaker IVDS Partners	66	B
840086	Eagle Interactive Partners, LP	67	A
840087	One Number Information Systems, Inc.	67	B
840088	21st Century Interactive Partnership	68	A
840089	M&B XXXIX, Inc.	68	B
840090	Kingdon Hughes	69	B
840091	Multimedia Computer Communication, Inc.	70	A
840092	IVDS Corp.	70	B
840093	Combined Interactive, Inc.	71	B
840094	Gonzalo Vidal	73	A
840095	WCI Partners	73	B
840096	Philip Chike Nchekwube, Esq.	74	A
840097	IVDS Auction Consortium Limited Partnership	74	B
840098	Acoma Corporation	75	A
840099	Joann Hartley	75	B
840100	Erwin Aguayo Jr.	76	A
840101	IVIDCO, LLC	76	B
840102	Joann Hartley	77	A
840103	Gateway Communications, Inc.	77	B
840104	21st Century Interactive Partnership	78	A
840105	Dunbar Television Corporation	78	B
840106	Pro Capital Resources, Inc.	79	A
840107	Virginia Alexander	79	B
840108	Gulfnet Communications, Inc.	80	A
840109	Southeast Equities, Inc.	80	B
840110	Harinder Kumra	81	A
840111	Loli, Inc.	81	B
840112	Elleron Telecommunications Corp.	82	A
840113	American Interactive West, Inc.	82	B
840114	Daniel Rivera Sr.	83	A
840115	Emerging Technology Partners	84	B
840116	Fulton Software	85	A
840117	Ernestine Kincer	85	B
840118	Elleron Telecommunications Corp.	86	B
840119	American Interactive East, Inc.	87	A

File No.	Applicant	Market No.	Frequency Block
840120	Eagle Interactive Partners, LP	88	A
840121	Harford SMR Inc.	88	B
840122	IVIDCO, LLC	89	A
840123	Stephen Elliot	89	B
840124	Intervisions Communications Technologies	90	A
840125	MKS Interactive, Inc.	90	B
840126	Tele-Link Communications, Inc.	91	A
840127	Hispania & Associates, Inc.	91	B
840128	IVDS Enterprises Joint Venture	92	A
840129	21st Century Interactive Partnership	94	B
840130	Albert Ervin	95	A
840131	L.R. Byrd & Associates/Hot Topics Network	95	B
840132	IVDS Enterprises Joint Venture	96	A
840133	Shaker IVDS Partners	96	B
840134	Trans Pacific Interactive, Inc.	97	A
840135	WCI Partners	97	B
840136	IVIDCO, LLC	98	A
840137	Stephen Elliot	98	B
840138	Triad TV Data	99	A
840139	Dunbar Television Corporation	99	B
840140	Loli, Inc.	100	B
840141	Southeast Equities, Inc.	101	B
840142	Interactive Development Enterprises Corp.	102	A
840143	Micom Partners	102	B
840144	Bay Shore IVDS Partners	103	B
840145	22nd Century Communications, Inc.	104	B
840146	Interactive Control Two, Inc.	105	A
840147	Kingdon Hughes	105	B
840148	TV-Active Partnership	106	A
840149	Active Communications Partners	106	B
840150	Carl Davis	107	A
840151	Uniteview-ICI, LP	107	B
840152	Eagle Interactive Partners, LP	108	A
840153	Radmila Tise	109	B
840154	20th Century Interactive, Inc.	110	A
840155	Friends of IVDS	110	B
840156	Rajesh Kumra	111	A
840157	IVDS Auction Consortium Limited Partnership	111	B
840158	Dr. Joseph Zavaletta	112	A
840159	M&B XXXIX, Inc.	112	B
840160	Interactive Video Corp.	113	A
840161	Euphemia Banas	113	B
840162	Loli, Inc.	115	B
840163	Interactive Communications Group, Inc.	116	A
840164	Shaker IVDS Partners	116	B
840165	America 52 West, Inc.	117	A
840166	Mary's Radio Shop	117	B
840167	Kingdon Hughes	118	B
840168	Women's Collateral Access Fund, Inc.	119	A
840169	Andrew Saban	119	B
840170	Eagle Interactive Partners, LP	120	A
840171	Combined Interactive, Inc.	120	B

File No.	Applicant	Market No.	Frequency Block
840172	Kingdon Hughes	121	B
840173	Micom Partners	123	A
840174	Gonzalo Vidal	124	B
840175	Interactive Innovations, Inc.	125	B
840176	Premier Interactive, Inc.	126	B
840177	Joann Hartley	127	A
840178	AG Partners	127	B
840179	Acoma Corporation	128	A
840180	Dr. Joseph Zavaletta	128	B
840181	Richard Quiroga	129	A
840182	IVDS On-Line Partnership	130	A
840183	Shaker IVDS Partners	130	B
840184	Loli, Inc.	131	A
840185	M&B XXXIX, Inc.	131	B
840186	Friends of IVDS	132	B
840187	Loli, Inc.	133	B
840188	Whitehall Wireless Corporation	134	A
840189	Vista Communications, Inc.	135	A
840190	Uniteview-ICI, LP	135	B
840191	New Wave Communications, Inc.	136	A
840192	Virginia Alexander	136	B
840193	Intervision Communications Technologies	137	A
840194	Eagle Interactive Partners, LP	138	A
840195	Friends of IVDS	138	B
840196	Eagle Interactive Partners, LP	139	A
840197	Active Communications Partners	139	B
840198	Triad TV Data	140	A
840199	D. Kent Moss	140	B
840200	Kingdon Hughes	141	A
840201	Remote Vision Interactive, Inc.	141	B
840202	Carl Davis	142	A
840203	On-Screen USA Interactive, Inc.	142	B
840204	Two Way TV Inc.	143	A
840205	P.A.W., Inc.	143	B
840206	Sejin Chung	144	A
840207	Loli, Inc.	144	B
840208	KMC Interactive TV, Inc.	145	A
840209	P.A.W., Inc.	145	B
840210	American 52 East, Inc.	146	A
840211	Elleron Telecommunications Corp.	147	A
840212	Hispania & Associates, Inc.	147	B
840213	Vista Communications, Inc.	148	A
840214	Virginia Alexander	148	B
840215	Active Communications Partners	149	A
840216	Interactive Communications Group, Inc.	149	B
840217	Loli, Inc.	150	A
840218	Two Way TV Inc.	150	B
840219	IVDS On-Line Partnership	151	A
840220	Pegasus IVDS, Inc.	151	B
840221	Loli, Inc.	152	A
840222	Uniteview-ICI, LP	152	B
840223	Eagle Interactive Partners, LP	153	A

File No.	Applicant	Market No.	Frequency Block
840224	Pegasus IVDS, Inc.	153	B
840225	IVDS/RLV Partnership	154	B
840226	Eagle Interactive Partners, LP	155	A
840227	Star Interactive Video	155	B
840228	Loli, Inc.	156	A
840229	KC Communications, Inc.	156	B
840230	22nd Century Communications, Inc.	157	A
840231	Premier Interactive, Inc.	157	B
840232	Progressive Communications	158	A
840233	TV-Active Partnership	158	B
840234	NAB-IVDS Group, Inc.	159	A
840235	Info Access	160	A
840236	Two Way TV Inc.	160	B
840237	Superior Interactive Group, Inc.	161	B
840238	Acoma Corporation	162	A
840239	Dr. Joseph Zavaletta	162	B
840240	Donald Lee	163	A
840241	SBM Holdings, Incorporated	163	B
840242	Shaker IVDS Partners	164	A
840243	Active Communications Partners	165	B
840244	Active Communications Partners	166	A
840245	IVDS Corp.	166	B
840246	Shaker IVDS Partners	167	B
840247	Bernard Pasquet	168	A
840248	Pegasus IVDS, Inc.	169	A
840249	Interamerican Cellular Communications Corp.	169	B
840250	Red Hot Radio	170	A
840251	Joann Hartley	170	B
840252	New Wave Communications, Inc.	171	B
840253	Windgate Fund, LLC268205	172	A
840254	IGGW Interactive Inc.	172	B
840255	Eagle Interactive Partners, LP	173	A
840256	Southeast Equities, Inc.	174	B
840257	Deko Holdings Corporation	175	A
840258	Harinder Kumra	175	B
840259	21st Century Group General Partnership	176	A
840260	MAR Partnership	177	A
840261	21st Century Interactive Partnership	177	B
840262	On-Screen USA Interactive, Inc.	178	A
840263	Women's Collateral Access Fund, Inc.	178	B
840264	Donald Lee	179	A
840265	IVDS Enterprises Joint Venture	179	B
840266	Carl Davis	180	A
840267	TV-Active Partnership	180	B
840268	Nationwide ITV Partnership	181	A
840269	Active Communications Partners	182	A
840270	Skynet Research, Inc.	183	A
840271	American Interactive East, Inc.	183	B
840272	Gulfnet Communications, Inc.	184	B
840273	21st Century Group General Partnership	186	A
840274	IVIDCO, LLC	186	B
840275	Richard Quiroga	187	A

File No.	Applicant	Market No.	Frequency Block
840276	Loli, Inc.	187	B
840277	The Hago Company, Inc.	188	B
840278	On-Screen USA Interactive, Inc.	189	A
840279	Interactive Innovations, Inc.	189	B
840280	Uniteview-ICI, LP	190	B
840281	West Coast Partners #22	191	A
840282	Premier Interactive, Inc.	191	B
840283	John Elliott	192	A
840284	Friends of IVDS	193	A
840285	WJT Enterprises	193	B
840286	Richard Quiroga	194	A
840287	Two Way TV Inc.	194	B
840288	Infopower Inc.	195	A
840289	National Technologies, Unlimited	196	A
840290	Elleron Telecommunications Corp.	196	B
840291	Southeast Equities, Inc.	197	B
840292	America 52 West, Inc.	198	A
840293	Skynet Research, Inc.	198	B
840294	Women's Collateral Access Fund, Inc.	199	A
840295	Triad TV Data	200	A
840296	Royal Communications, Inc.	200	B
840297	Elleron Telecommunications Corp.	201	A
840298	Interamerican Cellular Communications Corp.	202	A
840299	Hispania & Associates, Inc.	202	B
840300	Frances Lyles	203	B
840301	Elleron Telecommunications Corp.	204	A
840302	Interamerican Cellular Communications Corp.	204	B
840303	Red Hot Radio	205	A
840304	Two Way TV Inc.	206	A
840305	ABR Communications	206	B
840306	Friends of IVDS	207	A
840307	WJT Enterprises	207	B
840308	Knightsbridge Business Network, Inc.	208	B
840309	MAR Partnership	209	B
840310	America 52 West, Inc.	210	A
840311	Uniteview-ICI, LP	210	B
840312	IVDS Corp.	212	A
840313	Pegasus IVDS, Inc.	213	A
840314	MAR Partnership	213	B
840315	Washington Communications Inc.	214	A
840316	America 52 West, Inc.	214	B
840317	Two Way TV Inc.	215	A
840318	New Wave Communications, Inc.	215	B
840319	Loli, Inc.	216	A
840320	Euphemia Banas	216	B
840321	Interactive Video Corp.	217	A
840322	Vitech Corporation	217	B
840323	IVDS On-Line Partnership	218	A
840324	WCTV Partners	218	B
840325	Gulfnet Communications, Inc.	219	A
840326	Michael Kang	220	A
840327	Complete IVDS, Inc.	220	B

File No.	Applicant	Market No.	Frequency Block
840328	Interactive Communications Group, Inc.	221	A
840329	Two Way TV Inc.	221	B
840330	Virginia Alexander	222	A
840331	Joann Hartley	222	B
840332	Richard Quiroga	223	A
840333	Vitech Corporation	223	B
840334	Tel/Logic Inc.	224	A
840335	Andrew Saban	224	B
840336	Manuel Moreno	225	A
840337	P.A.W., Inc.	225	B
840338	Eagle Interactive Partners, LP	226	A
840339	Active Communications Partners	226	B
840340	One Number Information Systems Inc.	227	B
840341	Kingdon Hughes	228	B
840342	Seven Gables Properties, Inc.	229	A
840343	Cyrus K. Dam Survivors Trust	229	B
840344	Vitech Corporation	230	A
840345	Media Ventures	230	B
840346	TV-Active Partnership	231	A
840347	P.A.W., Inc.	231	B
840348	21st Century Group General Partnership	232	A
840349	The Hago Company, Inc.	232	B
840350	Vitech Corporation	233	A
840351	Nanowave Technologies	233	B
840352	Eagle Interactive Partners, LP	234	A
840353	Haynes Communications Corporation	235	B
840354	Windgate Fund, LLC268205	236	A
840355	Virginia Alexander	236	B
840356	Two Way TV Inc.	237	A
840357	ABR Communications	237	B
840358	Two Way TV Inc.	238	A
840359	Shaker IVDS Partners	238	B
840360	Two Way TV Inc.	239	A
840361	SBM Holdings, Incorporated	239	B
840362	G. Ray Hale	240	A
840363	ABR Communications	240	B
840364	America 52 West, Inc.	241	A
840365	Joann Hartley	241	B
840366	Pro Capital Resources, Inc.	242	A
840367	Virginia Alexander	242	B
840368	Zarg Corporation	243	A
840369	Virginia Alexander	243	B
840370	Interactive Innovations, Inc.	244	B
840371	Graceba Total Communications, Inc.	246	A
840372	Vitech Corporation	246	B
840373	Bellingham Corporation	247	A
840374	Andrew Saban	247	B
840375	New England Mobile Communications Inc.	248	A
840376	Vitech Corporation	249	A
840377	Cyberkom	249	B
840378	Media Ventures	250	B
840379	Rita McCauley	251	A

File No.	Applicant	Market No.	Frequency Block
840380	Pegasus IVDS, Inc.	251	B
840381	Red Hot Radio	252	A
840382	Stephen Elliott	253	B
840383	Philip Chike Nchekwube, Esq.	254	A
840384	New Wave Communications, Inc.	254	B
840385	Vision TV, Inc.	255	B
840386	Deko Holdings Corporation	256	A
840387	Deko Holdings Corporation	257	A
840388	Friends of IVDS	257	B
840389	WCTV Partners	258	A
840390	Wayne Partners	258	B
840391	Clarke Group	259	A
840392	Bay Shore IVDS Partners	259	B
840393	G. Ray Hale	260	A
840394	Women's Collateral Access Fund, Inc.	260	B
840395	Eagle Interactive Partners, LP	261	A
840396	Friends of IVDS	261	B
840397	Wayne Partners	262	A
840398	Frances Lyles	262	B
840399	21st Century Group General Partnership	263	A
840400	Vitech Corporation	263	B
840401	WCTV Partners	264	A
840402	L.R. Byrd & Associates/Hot Topics Network	264	B
840403	Active Communications Partners	265	A
840404	Andrew Saban	265	B
840405	Vitech Corporation	266	A
840406	Women's Collateral Access Fund, Inc.	267	A
840407	Stephen Elliott	267	B
840408	Remote Vision Interactive, Inc.	268	A
840409	Two Way TV Inc.	268	B
840410	Triad TV Data	269	A
840411	Uniteview-ICI, LP	269	B
840412	Elleron Telecommunications Corp.	270	A
840413	Washington Communications Inc.	270	B
840414	Vitech Corporation	271	A
840415	MAR Partnership	271	B
840416	Eagle Interactive Partners, LP	272	A
840417	Star Interactive Video	272	B
840418	Media Ventures	273	A
840419	Vitech Corporation	273	B
840420	Cyrus K. Dam Survivors Trust	274	A
840421	Virginia Alexander	274	B
840422	Vitech Corporation	275	B
840423	Interactive Communications Group, Inc.	276	A
840424	G. Ray Hale	276	B
840425	Vitech Corporation	277	A
840426	Interactive Innovations, Inc.	277	B
840427	Two Way TV Inc.	278	A
840428	Stephen Elliott	278	B
840429	Wayne Partners	279	A
840430	John Elliott	279	B
840431	Windgate Fund, LLC268205	280	B

File No.	Applicant	Market No.	Frequency Block
840432	Acoma Corporation	281	A
840433	Dr. Joseph Zavaletta	281	B
840434	P.A.W., Inc.	282	A
840435	Shaker IVDS Partners	282	B
840436	Graceba Total Communications, Inc.	283	A
840437	Styles Interactive Inc.	283	B
840438	Loli, Inc.	284	A
840439	Vitech Corporation	284	B
840440	Cyrus K. Dam Survivors Trust	285	A
840441	21st Century Interactive Partnership	285	B
840442	Elleron Telecommunications Corp.	286	A
840443	Bay Shore IVDS Partners	286	B
840444	The Hago Company, Inc.	287	A
840445	Richard Quiroga	287	B
840446	Joann Hartley	288	A
840447	Mary's Radio Shop	288	B
840448	Sioux Valley Rural Television Inc.	289	B
840449	21st Century Group General Partnership	290	A
840450	Media Ventures	290	B
840451	ABR Communications	291	A
840452	Vitech Corporation	291	B
840453	Infopower Inc.	292	B
840454	Elleron Telecommunications Corp.	293	A
840455	Robert Steele	293	B
840456	Loli, Inc.	294	A
840457	Vitech Corporation	294	B
840458	Complete IVDS, Inc.	295	A
840459	Interactive Development Enterprises Corp.	296	A
840460	G. Ray Hale	297	A
840461	New Wave Communications, Inc.	297	B
840462	Women's Collateral Access Fund, Inc.	298	A
840463	Vitech Corporation	298	B
840464	G. Ray Hale	299	A
840465	Friends of IVDS	299	B
840466	Dr. Joseph Zavaletta	300	A
840467	Infopower Inc.	300	B
840468	Joann Hartley	301	A
840469	Virginia Alexander	301	B
840470	Women's Collateral Access Fund, Inc.	302	A
840471	ABR Communications	302	B
840472	Media Ventures	303	A
840473	Vitech Corporation	303	B
840474	Media Ventures	304	A
840475	Vitech Corporation	304	B
840476	Women's Collateral Access Fund, Inc.	305	A
840477	Loli, Inc.	306	A
840478	Argosy, Inc.	306	B

INDEX OF IVDS MARKET NUMBERS AND LOCATIONS

Market	Location
5	Detroit-Ann Arbor, MI
11	St. Louis, MO
12	Miami-Fort Lauderdale-Hollywood, FL
13	Pittsburgh, PA
14	Baltimore, MD
15	Minneapolis-St. Paul, MN
16	Cleveland, OH
17	Atlanta, GA
18	San Diego, CA
19	Denver-Boulder, CO
20	Seattle-Everett, WA
21	Milwaukee, WI
22	Tampa-St.Petersburg, FL
23	Cincinnati, OH
24	Kansas City, MO-KS
25	Buffalo, NY
26	Phoenix, AZ
27	San Jose, CA
28	Indianapolis, IN
29	New Orleans, LA
30	Portland, OR-WA
31	Columbus, OH
32	Hartford-New Britain-Bristol, CT
33	San Antonio, TX
34	Rochester, NY
35	Sacramento, CA
36	Memphis, TN-AR-MS
37	Louisville, KY-IN
38	Providence-Warwick-Pawtucket, RI
39	Salt Lake City-Ogden, UT
40	Dayton, OH
41	Birmingham, AL
42	Bridgeport-Stamford-Norwalk-Danbury, CT
43	Norfolk-Virginia Beach-Portsmouth, VA-NC
44	Albany-Schenectady-Troy, NY
45	Oklahoma City, OK
46	Nashville-Davidson, TN
47	Greensboro-Winston Salem-High Point, NC
48	Toledo, OH-MI
49	New Haven-West Haven-Waterbury-Meriden, CT
50	Honolulu, HI
51	Jacksonville, FL
52	Akron, OH
53	Syracuse, NY
54	Gary-Hammond-East Chicago, IN
55	Worchester-Fitchburg-Leominster, MA
56	Northeast Pennsylvania, PA
57	Tulsa, OK
58	Allentown-Bethlehem-Easton, PA-NJ
59	Richmond, VA

Market	Location
60	Orlando, FL
61	Charlotte-Gastonia, NC
62	New Brunswick-Perth Amboy-Sayreville, NJ
63	Springfield-Chicopee-Holyoke, MA
64	Grand Rapids, MI
65	Omaha, NE-IA
66	Youngstown-Warren, OH
67	Greenvile-Spartanburg, SC
68	Flint, MI
69	Wilmington, DE-NJ-MD
70	Long Branch-Asbury Park, NJ
71	Raleigh-Durham, NC
72	West Palm Beach-Boca Raton, FL
73	Ventura, CA
74	Fresno, CA
75	Austin, TX
76	New Bedford-Fall River, MA
77	Tuscon, AZ
78	Lansing-East Lansing, MI
79	Knoxville, TN
80	Baton Rouge, LA
81	El Paso, TX
82	Tacoma, WA
83	Mobile, AL
84	Harrisburg, PA
85	Johnson City-Kingsport-Bristol, TN-VA
86	Albuquerque, NM
87	Canton, OH
88	Chattanooga, TN-GA
89	Wichita, KS
90	Charleston-North Charleston, SC
91	San Juan-Caguas, PR
92	Little Rock-North Little Rock, AR
93	Las Vegas, NV
94	Saginaw-Bay City-Midland, MI
95	Columbia, SC
96	Fort Wayne, IN
97	Bakersfield, CA
98	Davenport-Rock Island-Moline, IA-IL
99	York, PA
100	Shreveport, LA
101	Beaumont-Port Arthur, TX
102	Des Moines, IA
103	Peoria, IL
104	Newport News-Hampton, VA
105	Lancaster, PA
106	Jackson, MS
107	Stockton, CA
108	Augusta, GA-SC
109	Spokane, WA
110	Huntington-Ashland, WV-KY-OH
111	Vallejo-Fairfield-Napa, CA
112	Corpus Christi, TX

Market	Location
113	Madison, WI
114	Lakeland-Winter Haven, FL
115	Utica-Rome, NY
116	Lexington-Fayette, KY
117	Colorado Springs, CO
118	Reading, PA
119	Evansville, IN-KY
120	Huntsville, AL
121	Trenton, NJ
122	Binghamton, NY
123	Santa Rosa-Petaluma, CA
124	Santa Barbara-Santa Maria-Lompoc, CA
125	Appleton-Oshkosh-Neenah, WI
126	Salina-Seaside-Monterey, CA
127	Pensacola, FL
128	McAllen-Edinburg-Mission, TX
129	South Bend-Mishawaka, IN
130	Erie, PA
131	Rockford, IL
132	Kalamazoo, MI
133	Manchester-Nashua, NH
134	Atlantic City-Cape May, NJ
135	Eugene-Springfield, OR
136	Lorain-Elyria, OH
137	Melbourne-Titusville-Palm Bay, FL
138	Macon-Warner Robins, GA
139	Montgomery, AL
140	Charleston, WV
141	Duluth, MN-WI
142	Modesto, CA
143	Johnstown, PA
144	Orange County, NY
145	Hamilton-Middletown, OH
146	Daytona Beach, FL
147	Ponce, PR
148	Salem, OR
149	Fayetteville, NC
150	Visalia-Tulare-Porterville, CA
151	Poughkeepsie, NY
152	Portland, ME
153	Columbus, GA-AL
154	New London-Norwich, CT
155	Savannah, GA
156	Portsmouth-Dover-Rochester, NH-ME
157	Roanoke, VA
158	Lima, OH
159	Provo-Orem, UT
160	Killeen-Temple, TX
161	Lubbock, TX
162	Brownsville-Harlingen, TX
163	Springfield, MO
164	Fort Myers, FL
165	Fort Smith, AR-OK

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-236
Washington, D.C. 20554

In re Applications of	)	
	)	
ACC Global Corporation	)	File No. I-T-C-93-035
	)	
Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to operate as an international private line carrier	)	
	)	
Alanna Inc.	)	File No. I-T-C-93-042
	)	
Application for Authority pursuant to Section 214 of the Communications Act of 1934, as amended, to operate as an international private line carrier	)	

MEMORANDUM OPINION, ORDER AND CERTIFICATION

Adopted: September 19, 1994 Released: October 6, 1994

By the Commission: Commissioner Quello issuing a statement.

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I. INTRODUCTION

1. The above-captioned applications filed by ACC Global Corporation (ACC) and Alanna, Inc. (Alanna) seek authorization, pursuant to Section 214 of the Communications Act of 1934 (the Act), as amended, 47 U.S.C. §214, to resell international private lines for the provision of switched services between the United States and the United Kingdom. Pursuant to our International Resale Order,[1] we require applicants seeking to resell international private lines for the provision of switched services to demonstrate that equivalent resale opportunities exist in the country at the other end of the private line for U.S.-based carriers. The ACC and Alanna applications request us to find that the United Kingdom meets that standard.

2. On balance, we find that the evidence submitted in the record demonstrates that equivalent international private line resale opportunities exist in the United Kingdom for U.S.-based carriers seeking to provide service between the United States and the United Kingdom. We base our finding of equivalency on the current U.K. regulatory regime, and will continue to monitor future regulatory developments. We accordingly grant ACC and Alanna authorization to provide their requested services, subject to the conditions set forth below.[2]

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[1] In the Matter of the Regulation of International Accounting Rates Proceeding, Phase II, First Report and Order, (International Resale Order), 7 FCC Rcd 559 (1992); see also, In the Matter of the Regulation of International Accounting Rates Proceeding, Phase II, Order on Reconsideration and Third Further Notice of Proposed Rulemaking (Order on Recon.), 7 FCC Rcd 7927 (1992).

[2] We note that resale of U.S. - U.K. international private lines interconnected at both ends is not legally permissible in the United Kingdom until the United Kingdom designates the United States as an equivalent country. We thus grant these Section 214 authorizations subject to the condition that they may not initiate service until and unless the United Kingdom designates the United States an equivalent country. See para. 55, infra.

II. BACKGROUND

3. In the International Resale Order, we found that encouraging the resale of international telecommunications services would further the dual public interest in cost-based prices for international telecommunications services and more efficient use of international facilities. Specifically, we concluded that promoting the resale of international private lines to provide switched services would foster new entry into the international telecommunications market and exert downward pressure on above-cost international accounting rates[3] and foreign collection rates[4] through the diversion of switched traffic to resold private lines.[5]

4. We further concluded, however, that permitting "one-way" resale, i.e., resale only from the overseas point inbound to the United States, would have the undesirable effect of undermining the goals and benefits that international private line resale is intended to achieve. Such "one-way" resale could enable foreign carriers or administrations unilaterally to divert to private lines U.S. inbound switched traffic, for which U.S. carriers normally receive settlements payments under the International Settlements Policy (ISP),[6] thereby evading the settlements

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[3] The accounting rate refers to a rate negotiated between two correspondent carriers on a particular international route which is intended to allow each carrier to recover the costs of the facilities it has provided for terminating an international telex, telegraph, or telephone call. Most operating agreements provide for the two carriers to split the accounting rate 50/50. At settlement each correspondent carrier nets the number of minutes that it originated against the number of minutes its correspondent carrier originated. The carrier that originated the greater number of minutes makes a "settlement payment" to the other correspondent carrier calculated by multiplying the net difference in minutes by one-half the accounting rate.

[4] Collection rates are those tariffed rates charged to customers, or end users.

[5] See International Resale Order, 7 FCC Rcd at 560.

[6] Id. at 561. The ISP requires uniform settlement rates, accounting rates and division of tolls for U.S. international carriers on parallel routes. This requirement is aimed at preventing foreign telecommunications administrations from being able to "whipsaw" U.S. carriers, or play U.S. carriers off against each other to the disadvantage of other U.S. carriers and U.S. ratepayers. See Mackay Radio and Telegraph Company, Inc., 2 FCC 392 (1936), aff'd by the Commission en banc, 4 FCC 150 (1937), aff'd sub nom. Mackay Radio and Telegraph Co. v. F.C.C.,

process for that traffic.[7] By contrast, without the ability to resell private lines in the reverse direction from the United States to the foreign country, U.S. carriers would necessarily continue to route outbound traffic over switched lines, thus continuing to pay above-cost international accounting rates subject to the ISP.

5. Permitting such unilateral evasion of the settlements process would not only exacerbate the U.S. net settlements deficit, it would also fail to put downward pressure on international accounting rates and foreign collection rates, thereby frustrating the policy goals of international private line resale. Accordingly, we concluded that we would authorize the resale of international private lines interconnected to the public switched network (PSN) only to countries that allow such resale to occur in both directions, and required each applicant seeking to resell international private lines in the United States to demonstrate that the destination foreign country affords resale opportunities equivalent to those available under U.S. law.[8] To comply with this requirement, both ACC and Alanna included information in their applications intended to demonstrate that such opportunities exist in the United Kingdom.

6. ACC, a corporation organized under the laws of the State of Delaware, is a newly-formed interexchange carrier.[9] It is wholly-owned by ACC Corp., a publicly-traded U.S. corporation.

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97 F.2d 641 (D.C. Cir. 1938). For example, a foreign carrier could offer to route additional minutes to one U.S. carrier in exchange for a non-50/50 split of the accounting rate.

[7] For example, a foreign-based resale carrier could engage in one-way resale by leasing both the foreign and U.S. segments of an international private line in order to carry traffic into the United States and hand it off to a domestic U.S. carrier through a connection to the U.S. public switched network (PSN). The Commission's Rules do not explicitly subject traffic carried over international private lines to the ISP. See fONOROLA/EMI Order, 7 FCC Rcd 7312, n.5 (1992), fONOROLA/EMI Order on Reconsideration, 9 FCC Rcd 4066, 4067 (1994).

[8] See Section 63.01(k)(5), 47 C.F.R. 63.01(k)(5).

[9] ACC is affiliated with several intrastate, interstate and international service providers. ACC is also affiliated with foreign resale carriers in Canada and the United Kingdom. See ACC Application at 2-3.

ACC proposes to lease, from authorized U.S. carriers,[10] international private lines interconnected to the PSN at both ends, and to use them for the provision of switched services, including operator assisted services, between the United States and the United Kingdom.

7. Alanna, a corporation organized under the laws of the Commonwealth of Massachusetts, is wholly-owned by FMR Corp. (FMR), the nation's largest privately-owned investment management organization.[11] Together with its subsidiaries (collectively "Fidelity Investments"), FMR invests in and operates emerging telecommunications businesses, among other business activities.[12] Alanna initially proposes to lease, from authorized U.S. carriers,[13] international private lines interconnected to the PSN

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[10] ACC proposes to resell international private line services obtained from the following carriers pursuant to their appropriate tariffs: AT&T (Tariff FCC Nos. 2, 9, 11, and 12), C&W (Tariff FCC No. 3), MCI (Tariff FCC Nos. 1 and 2), MCI/OTI (Tariff FCC Nos. 1 and 2), MCI/WU (Tariff FCC Nos. 20 and 27), and Sprint (Tariff FCC Nos. 1, 2, 5, and 7). See Application at 8.

[11] See Alanna Application at 2. Alanna's parent corporation, FMR, also owns City of London Telecommunications (COLT), which is a carrier licensed in the United Kingdom to provide domestic facilities-based service and international simple resale. COLT is a recent entrant in the U.K. telecommunications market, where BT controls of approximately 97% of local U.K. terminations and has the most fully developed long distance network. No party argues, and we find no evidence in the record to suggest, that COLT has the ability to discriminate in favor of Alanna through control of bottleneck services or facilities in the United Kingdom. We, therefore, conclude that Alanna merits regulation as a nondominant carrier on the U.S. - U.K. route for the services authorized herein.

[12] In conjunction with its various business activities, Fidelity Investments manages and operates an extensive telecommunications system consisting of leased lines, private microwave systems, private fiber optic systems and voice and data switching centers that link its customer service centers and individual customers on a nationwide basis. See Alanna Application at 2.

[13] Alanna proposes to resell half-circuits obtained from one or more of the following carriers pursuant to their appropriate tariffs: TRT (Tariff FCC No. 15), MCI International (Tariff FCC Nos. 1 and 2), MCI/OTI (Tariff FCC Nos. 1 and 2), MCI/WUI (Tariff FCC Nos. 20 and 27), Sprint (Tariff FCC Nos. 1, 2, 5, and 7), AT&T (Tariff FCC Nos. 2, 9, 11 and 12), and C&W

at the U.S.-end only for the provision of switched services, including voice and data, between the United States and the United Kingdom.[14]

8. We placed both applications on public notice on December 16, 1992.[15] We received comments in support of a U.K. equivalency finding from Cable & Wireless, Inc. (CWI), BT plc. (BT),[16] and the British Embassy. AT&T filed a petition to deny against both the ACC and Alanna applications. Both ACC and Alanna filed oppositions[17] to AT&T's petition and AT&T replied.[18] Subsequently ACC filed additional information to support an

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(Tariff FCC No. 3). See Letter from Robert B. Kelly, Counsel to Alanna, Inc. to George S. Li, Chief, International Facilities Division, Common Carrier Bureau (dated September 7, 1994).

[14] While we require the foreign destination country to afford U.S.-based carriers an equivalent opportunity to interconnect an international private line at both ends, we do not seek to impose a requirement that each applicant engage in the resale of international private lines interconnected at both ends. We view such matters as individual business decisions. Eventually, Alanna also intends to resell international private lines interconnected at the U.K.-end only. See Alanna Opposition at 3.

[15] The ACC and Alanna applications appeared on Public Notice I-6739 and Public Notice I-6745, respectively.

[16] BT is the principal service provider in the international telecommunications services market in the United Kingdom. BT also has about 97 percent of the local terminations and the most fully developed long distance network in the United Kingdom.

[17] On January 21, 1993, Alanna requested a one-week extension of time in which to file its opposition to AT&T's petition to deny. AT&T did not object to this request. We believe that it is in the public interest to develop a full and complete record of the issues before us. We, therefore, accept Alanna's late-filed opposition.

[18] On June 23, 1994, AT&T also filed as an ex parte submission its April 29, 1994, comments to the Office of Telecommunications (Oftel) in response to the March 1994 Oftel Statement on Interconnection and Accounting Separation. Oftel's Statement is discussed, infra, at para. 24.

equivalency finding.[19] In response, AT&T, Telstra U.K.,[20] and BT North America (BTNA)[21] filed comments to which AT&T, CWI, ACC, MFSI, BTNA and the British Embassy replied.

III. DISCUSSION

9. These applications ask the Commission to determine whether there are equivalent private line resale opportunities for U.S. - based carriers in the United Kingdom. In the International Resale Order, we declined to adopt specific criteria for determining whether equivalency exists in a particular foreign country. We indicated, however, that our standard of equivalent resale opportunities requires, at a minimum, that the foreign country in which the international private line will either originate or terminate: 1) permit open entry for U.S.-based carriers into the international resale market; 2) mandate nondiscriminatory treatment of U.S.-based carriers; and 3) authorize U.S.-based carriers to interconnect international private lines to the PSN at both ends.[22] We emphasized that the prices, terms, and conditions afforded U.S.-based carriers should be equivalent to those available to

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[19] ACC and MFS International (MFSI) each filed a report on its execution of an interconnection agreement with BT and receipt of a full access deficit contribution (ADC) waiver. On July 21, 1994, we placed these reports on public notice seeking comments. See Public Notice Report No. I-7007. MFSI also has a Section 214 application for international private line resale authority to the United Kingdom pending before us. We will process that application separately.

[20] Telstra (UK) Limited (Telstra UK) is a U.K. registered company which is a wholly-owned subsidiary of Telstra Corporation Limited of Australia (Telstra). Telstra is owned by the Australian Government and is the largest telecommunications service provider in Australia. Telstra UK holds a license to be a Public Telecommunications Operator (PTO) in the United Kingdom which authorizes Telstra UK to provide, inter alia, ISR services. Telstra UK is thus a potential ISR competitor on the U.S. - U.K. route. A PTO is an entity that is authorized to operate a telecommunications system under Section 7 of the United Kingdom's Telecommunications Act 1984 and whose system is designated as a public telecommunications system.

[21] BTNA filed its comments in conjunction with supplemental comments filed on its Section 214 international resale application, File No. I-T-C-93-126.

[22] See International Resale Order, 7 FCC Rcd at 562.

foreign-based carriers providing service in the foreign country.[23] We stated that licensing, tariffing, and other terms and conditions that may be associated with the provision of services to, and by, U.S.-based carriers are among the factors that may be relevant in evaluating equivalency.[24] The International Resale Order, however, did not require that every foreign regulatory, legal, technical and market condition affecting resellers mirror those in the United States. It is sufficient that these conditions, as a whole, afford resellers opportunities that are substantially similar to those available in the United States.

10. Pursuant to Section 63.01(k)(5) of our rules, the applicants submitted information and documentation intended to show that equivalent resale opportunities exist in the United Kingdom. In particular, the applicants' submissions address the basic issues of open entry for, and nondiscriminatory treatment of, U.S.-based resellers. The applicants also address the ability of U.S. carriers to interconnect their international private lines to the public switched network in the United Kingdom. AT&T and Telstra assert that the applicants have failed to sustain their burden of demonstrating that the legal, technical and market opportunities for resale in the United Kingdom are equivalent to those available in the United States.

A. Open Entry

11. We first address the issue of whether open entry for U.S.-based carriers seeking to provide private line resale for switched services exists in the United Kingdom. The record indicates that the United Kingdom imposes no restrictions on either foreign ownership of telecommunications service providers or foreign participation in the U.K. resale market, or any other sector of the U.K. telecommunications market.[25] The openness of the U.K. market is illustrated by the fact that several U.S. carriers, or their U.K. affiliates, have been authorized by the U.K. Department of Trade and Industry (DTI), inter alia, to

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[23] Id.

[24] See International Resale Order, 7 FCC Rcd at 562; see also fONOROLA/EMI Order, 7 FCC Rcd at 7312.

[25] The press release, equivalent to a Commission policy statement, announcing grant of ACC's U.K. ISR license quotes the U.K. Minister of Trade and Technology as saying: "This invitation [to participate in ISR] is open to all companies regardless of their nationality. It is also my hope that I shall be able in the future to announce the opening up of international simple resale services on additional routes." See ACC Application at 16, n.3; see also MFSI Reply Comments at 2.

resell international private lines interconnected to the PSN at both ends for the provision of switched services. These include Sprint, Worldcom, MFS, ACC, and City of London Telecommunications (COLT), which is affiliated with Alanna. The United Kingdom has opened virtually all sectors of its telecommunications market to competition, with the notable exception of international facilities-based competition, which is limited to BT and Mercury Ltd.[26] Based on the absence of restrictions on foreign ownership or entry into the U.K. telecommunications resale market and the presence of U.S. carriers in the U.K. market, we conclude that the United Kingdom affords open entry for U.S.-based carriers.

B. Nondiscrimination

12. Second, the applicants have emphasized that the conditions placed on carriers in the United Kingdom's ISR market are administered without discrimination based on a carrier's country of origin. No commenter argues that any current U.K. law or regulation discriminates against U.S.-based resellers. In fact, ACC's U.K. affiliate, a U.S.-owned carrier, was the first operator, foreign or domestic, authorized to provide international simple resale (ISR) in the United Kingdom.

13. Furthermore, the United Kingdom requires BT to treat all U.K.-licensed competing carriers in a nondiscriminatory manner pursuant to Condition 17 of BT's license to provide telecommunications services as a public telecommunications operator (PTO).[27] Accordingly, we conclude that the U.K. regulatory regime satisfies our requirement of nondiscriminatory treatment of U.S.-based carriers.

C. Private Line Interconnection

14. Finally, the applicants assert that the United Kingdom affords equivalent resale opportunities because the U.K. regulatory framework permits the interconnection of international private lines to the PSN at both the U.K. and foreign end for the provision of switched services, or ISR. ISR is the United Kingdom's term for the resale of international private lines

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[26] See MCI Communications Corporation/British Telecommunications plc, Joint Declaratory Ruling and Order, FCC 94-188 (released July 25, 1994); see also BTNA Comments and its Supplemental Filing, pp.4-18. Despite its formal withdrawal of its duopoly policy, the U.K. government has indicated that it will not consider any applications for international facilities-based competition to BT and Mercury Ltd. Mercury is the second international facilities-based carrier, and is also a local and national service provider in the United Kingdom.

[27] For further discussion, see paragraph 23, infra.

interconnected to the public switched network at both ends, as opposed to one-end only. Under the U.K. regulatory regime, carriers wishing to engage in ISR are required to be individually licensed by DTI; carriers, however, wishing to engage in resale of private lines interconnected at one-end only, at either end, may operate pursuant to an existing class Telecommunications Services License (TSL), which does not require registration, individual authorization, or tariff filing.[28]

15. Similar to the U.S. approach, the United Kingdom only permits the introduction of ISR between the United Kingdom and foreign countries that it has determined to be equivalent. To date, the United Kingdom has designated Canada, Sweden, and Australia as equivalent countries.[29] Neither AT&T nor Telstra disputes that an appropriately licensed operator in the United Kingdom has the legal ability to interconnect both ends of an international private line to the PSN, subject to the United Kingdom's equivalency regime. We find that U.S.-based carriers licensed to provide ISR may interconnect their international private lines to the PSN at both ends.

16. In sum, we conclude that the U.K. regulatory policies governing entry, nondiscrimination, and the ability to interconnect an international private line to the PSN at both ends satisfy the minimum requirements established by our International Resale Order to permit a finding that equivalent resale opportunities exist for U.S.-based carriers in a foreign country. We now turn to the other issues raised in the record which may have an impact on our equivalency finding.

D. Other Terms and Conditions

17. We next address the contention of AT&T and Telstra that other U.K. regulatory policies associated with the provision of ISR services preclude a finding of equivalency for the U.K. resale market. As detailed below, the Commission has fully reviewed the U.K. regulatory environment and concluded that the current regulatory regime affords U.S.-based carriers

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[28] As Alanna proposes in its Section 214 application to resell international private lines interconnected to one-end only, Alanna may operate in the United Kingdom pursuant to the TSL class license.

[29] We also have pending before us applications that request a Commission equivalency determination for Sweden and Australia. See, e.g., CWI Application, File No. I-T-C-93-328 (filed September 3, 1993), and MFSI Application, File No. I-T-C-94-355 (filed June 10, 1994).

substantially equivalent resale opportunities. We will stay apprised of future regulatory developments as they occur in the United Kingdom to monitor their impact on the existing equivalency of the U.K. international resale market, and take any responsive action necessary.

1. U.K. Resale Market

18. Initially, AT&T argues that its claim that the resale market for international services in the United Kingdom offers limited opportunities for resale is evidenced by the lack of an active international resale market. Notwithstanding AT&T's characterization of the U.K. international resale market, we note that U.K. resellers of switched services, non-interconnected private lines, and one-end interconnected private lines are not required to register, obtain a license, or file tariffs in the United Kingdom. Without any U.K. registration, licensing or filing requirement, the actual level of such international resale activity between the United Kingdom and any country is difficult to estimate. We are, however, aware of at least two U.S. carriers, IDB/Worldcom[30] and Sprint, that are reselling international private lines, leased pursuant to the U.K. class Telecommunications System License (TSL)[31], to provide international services between the United Kingdom and the United States.

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[30] We note that a complaint now pending before the Commission, AT&T v. WorldCom, File No. E-93-103, filed September 24, 1993, raises the issue of whether IDB/Worldcom, a U.S. facilities-based carrier, is engaged in the unauthorized resale of international private lines for the provision of switched services. IDB/Worldcom, which is not specifically authorized by this Commission to resell international private lines for the provision of switched services, is providing international switched services in correspondence with its U.K. affiliate, which is using leased international private lines.

[31] The TSL is the Class License to Run Branch Systems to Provide Telecommunication Services Granted by the U.K. Secretary of State Under Section 7 of the Telecommunications Act 1984 (U.K. Telecom Act).

19. Second, we do not believe that the number of established resellers in the U.K. market is dispositive of whether actual resale opportunities currently exist. We believe that the regulatory reforms undertaken by Oftel over the past several months have contributed significantly to the development of a viable international private line resale market. Indeed, the British Embassy estimates that there are a dozen companies expressing interest in providing ISR services.[32] We note that several U.S. carriers, including ACC, MFSI, Sprint, Worldcom and AT&T, have been or are seeking to be licensed in the United Kingdom to provide ISR services. Thus, while AT&T's concerns may have had merit at the time it filed its earlier opposition, we believe, as discussed below, that the U.K. ISR market now permits U.S.-based resellers to engage in viable ISR operations between the United States and the United Kingdom.

20. Both AT&T and Telstra assert that other U.K. regulatory policies effectively limit the ability of resellers to engage in ISR activity in the United Kingdom. First, AT&T claims that U.K. policies limit the traffic volumes that an ISR operator may carry. AT&T specifically contends that Sections 7.1 and 7.3 of ACC's ISR license authorize the U.K. Secretary of State to require ACC to maintain a traffic ratio of inbound/outbound volumes proportionate to the ratio of inbound/outbound switched minutes in order to protect against any adverse consequences of ISR on the flow of settlements payments between the United Kingdom and the United States. As clarified by the British Embassy, the Secretary of State is authorized to require a proportionate ratio of inbound/outbound traffic, but such authority may only be exercised where an imbalance in traffic flow is attributable to anticompetitive behavior, and thus necessary to maintain effective competition.[33] We rely on the representation of the British Embassy that this provision may only be triggered where there is evidence of anticompetitive behavior on the part of the ISR operator, and not simply by disproportionate traffic flows.

21. In addition, these parties claim that the interconnection arrangements available to resellers in the United Kingdom, the U.K. system governing BT's recovery of a contribution to exchange access costs from ISR operators, and the U.K. policies with respect to other terms and conditions,

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[32] See Letter from the British Embassy to Donna Searcy, Secretary, Federal Communications Commission (dated February 1, 1993).

[33] See Letter from the British Embassy to Donna R. Searcy, Secretary, Federal Communications Commission (dated January 26, 1993).

including equal access and number portability, collectively restrict the ability of U.S.-based ISR operators to compete effectively with the established facilities-based carriers for international traffic. We address each of these claims below.

2. Standard Interconnection

22. Both AT&T and Telstra argue that we should not authorize international private line resale between the United States and the United Kingdom until U.K. ISR licensees can interconnect with BT on standard nondiscriminatory and published terms. ACC, BTNA and MFS respond that BT's offering of a standard interconnection arrangement and a standard price list on a nondiscriminatory basis is functionally equivalent to published interconnection tariffs. Although the record reflects that in the past U.K. interconnection policies did not require BT to offer ISR operators standard interconnection arrangements at uniform prices,[34] we conclude that recent developments as discussed below have addressed to a significant extent the concerns raised by AT&T and Telstra. Moreover, we are encouraged by Oftel's ongoing efforts to promote the availability of suitable interconnection arrangements at reasonable rates to ISR operators. This conclusion is based on several factors discussed below.

23. First, as ACC notes, Condition 13 of BT's license to operate a public telecommunications system (License) obliges BT to interconnect its network with those of other individually licensed carriers.[35] In addition, Condition 17 of BT's License prohibits BT from showing "undue preference or undue discrimination in relation to its obligations under its license", including the requirement to interconnect with licensed competing

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[34] Indeed, ACC itself acknowledged that it encountered significant difficulties and delay in negotiating an interconnection agreement with BT. As a result, ACC initially offered to accept a condition that we find the United Kingdom equivalent contingent on the execution of a commercially reasonable interconnection agreement between ACC and either BT or another acceptable facilities-based carrier. See ACC Application at 15-16. ACC also periodically filed detailed updates of its interconnection negotiations with BT. In light of the recent developments in the U.K. market, including BT's offering of a standard interconnection agreement and the grant of access deficit contribution waivers (see paras. 29-38, infra, for further discussion), ACC now contends that excellent opportunities exist today for U.S.-based carriers to compete in the U.K. ISR market. See ACC Report on Interconnection at 1.

[35] See ACC Application, Exhibit C.

carriers.[36] These conditions make explicit the U.K. regulatory authorities' commitment to ensure that BT's competitors are able to interconnect their networks with BT's local exchange network.

24. Moreover, during the pendency of this equivalency proceeding, Oftel has undertaken a comprehensive review of the interconnection and accounting regime applicable to BT.[37] Based on that review, Oftel established a three-part regulatory program to ensure the provision of reasonable interconnection arrangements for new and existing competitors to BT.[38] The first part established the BT/Mercury interconnect arrangement as a basis for an interim standard arrangement and charges for interconnection with BT, effective immediately.[39] The second part, which started in March, 1994, and will culminate January, 1995, entails the development of a standard list of interconnection services at costs that are based on fully allocated costs using historical cost accounting conventions and a transparent cost allocation system.[40] In conjunction with the second part, Oftel has prescribed accounting separation requirements for the different lines of business within BT's existing corporate structure and directed BT to publish its cost allocation system and transfer charging arrangements.[41] The third part, which is already underway, involves consideration of longer term issues, such as alternative costing bases, rate

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[36] See Letter from the British Embassy to William F. Caton, Acting Secretary, Federal Communications Commission (dated August 16, 1994).

[37] See Consultative Document on Interconnection and Accounting Separation, issued by the Director General of Telecommunications, Office of Telecommunications (Oftel), United Kingdom, June 1993.

[38] See Statement on Interconnection and Accounting Separation: The Next Steps, issued by the Director General of Telecommunications, Oftel, United Kingdom, March 1994.

[39] Id.

[40] Oftel has stated that, after the standard services and rates are prescribed, it will propose appropriate amendments to BT's License to reflect these new obligations. See Oftel Statement on Interconnection and Accounting Separation: The Next Steps at 5.

[41] In its Statement, Oftel announced its intention to proceed with the accounting separation among BT-Network, BT-Retail, BT-Wholesale, as proposed in its Consultative Document (see note 37, supra). Id.

structures for interconnection services, and the future of access deficit contributions.

25. As an immediate consequence of the Oftel review, BT currently is required to offer a standard interconnection arrangement to U.K.-licensed competitors on a nondiscriminatory basis. AT&T and Telstra maintain, however, that the current interconnection regime still precludes a finding of equivalency of the U.K. resale market. Specifically, AT&T argues that the lack of standard interconnection tariffs and prices based on standard charges creates significant asymmetries between the international private line resale market in the United States and the United Kingdom. In response, BTNA and other parties counter that there is no functional difference between a standard tariffed offering and BT's offering of a standard interconnection arrangement, including standard prices, which are public and available to any licensee qualified under U.K. law.[42] They note that, while the current BT interconnect prices are already based on the standard set forth in the BT/Mercury interconnect agreement, there are new standard BT interconnect prices scheduled to become effective in January 1995 which will be prescribed by Oftel, and, thus, should provide greater confidence to BT's competitors.[43]

26. We find for purposes of our regulatory analysis that it is more important for an equivalency determination to focus on the overall effect of the various elements of the foreign regulatory regime on the opportunities for viable international resale activity than the similarity of the regulatory structure to U.S. law. Thus, contrary to the claims of AT&T and Telstra, we do not find that the only approach to offering interconnect opportunities, for purposes of an equivalency analysis, is through tariff offerings. We further conclude, for the purposes of an equivalency evaluation, that the nondiscriminatory offering of published standard interconnect arrangements at standard prices is an adequate alternative to our regulatory approach of requiring tariffed service offerings and rates.

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[42] Pursuant to Condition 16A of its license, BT is required to publish new interconnection agreements, amendments to existing agreements, or, in the event that a contracting carrier requests confidentiality, an adequate description of the interconnection agreement, including the precise method of the calculation of charges so that a third party can calculate the charges. See Letter from British Embassy to William F. Caton, Acting Secretary, Federal Communications Commission (dated August 12, 1994).

[43] See BTNA Reply Comments at 8.

27. AT&T and Telstra further contend that BT's interconnection offerings are not equivalent to tariffed services because the possibility of a retroactive adjustment of BT's standard interconnection prices creates uncertainty in the resellers' business and cost planning. In addition, AT&T maintains that this contingency also raises competitive concerns because any such future adjustments could result in a retroactive increase in BT's prices to resellers. ACC, BTNA and MFSI reply that any such adjustments will likely be beneficial to the reseller.[44] ACC and MFSI note that BT has taken several steps to reduce its costs of providing service, such as network architecture upgrades. ACC claims that BT's actions coupled with Oftel's programs on interconnection will cause a downward adjustment of prices, if any adjustment occurs, resulting in a rebate to ISR operators.

28. Given the U.K. regulator's concern about encouraging the development of competition to BT, as evidenced, for example, by its issuance of ISR waivers and the development of standard interconnect prices, approval of retroactive upward adjustments would appear to be inconsistent with such a procompetitive policy. We are, thus, persuaded by the ISR licensees' arguments that a retroactive adjustment would likely result in a rebate to resellers, and thus, the possibility of such retroactive adjustments does not deter an equivalency finding for the United Kingdom. Moreover, as ACC notes, in any event BT may not increase rates for interconnection without Oftel approval.[45] If in practice, however, the result of any retroactive adjustments is a meaningful increase in costs to the ISR operators, we will likely need to review the equivalency of the U.K. market.

3. Access Deficit Contributions

29. AT&T also argues that the high level of the per minute access deficit contributions (ADCs) assessed to international private line resellers in the United Kingdom undermines the viability of the U.K. international resale market, and that the waivers of the ADCs payable by resellers are of only limited value due to the limited nature of the waiver regime, as discussed in detail below. The access deficit represents "the

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[44] In its Reply Comments at 10, BTNA states that the U.K. practice of adjusting regulated prices means that as BT's per unit costs of operating its network continue to decrease, so that retroactive adjustment to the standard interconnection charges will likely involve refunds by BT to the resellers, not increases.

[45] Under current procedures, BT must demonstrate that any proposed increase in costs are based on an Oftel-approved cost methodology. See ACC Reply Comments at 7, note 14.

extent to which the cost to BT of providing and maintaining customer connections to the network is not covered by line connection and rental" charges due to pricing restraints imposed on BT.[46] AT&T contends if ADCs were applied to ISR usage, they would have a serious adverse impact on the viability of the international resale market in the United Kingdom.[47] We are concerned that the high level of international ADCs and the ADC waiver regime, if not appropriately applied, may have a serious impact on the commercial viability of the ISR market. While we are satisfied, for the reasons discussed below, that the current interim regulatory measures are adequate to allow U.S.-based carriers to engage in commercially viable ISR activity, we are prepared to review the impact of any future developments to the ADC regime on U.S.-based carriers' opportunities to engage in ISR.

30. As set forth in Condition 13A.5(a) of BT's license, the Director-General of Oftel has the authority until July 1, 1997, to waive payment of the ADCs when he considers it necessary to "enable a person wishing to enter a particular market for the provision of telecom services to do so" or "to enable a person engaged in such a market to establish or maintain a presence in that market".[48] Oftel has expressly stated that waivers should be used to encourage the development of a wide range of telecommunications services at the "lowest sustainable prices".

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[46] See July 13, 1994, Press Release "Oftel Grants Eight Access Deficit Contribution (ADC) Waivers (ADC Press Release), issued by Oftel.

[47] Oftel has estimated that ADCs represent generally 10% of a carrier's total cost of service. The international ADCs are higher than those payable for local and national calls, and, consequently, international calls make a relatively higher contribution to funding BT's access deficit than local and national calls. See Explanatory Document at 2, para 6. Based on the BT/Mercury interconnect agreement, the average ADCs were calculated to be 8.45 pence per minute. The Explanatory Document, however, indicates that the more current average for ADCs is approximately 6.4 pence per minute, reflecting a downward movement. See Explanatory Document at 2, para. 7. In addition, we note that international ADCs vary according to the international route, resulting in disparate rates depending on the destination of the international traffic.

[48] See Explanatory Document for the determinations of waivers of access deficit contributions granted to ACC, Worldcom, COLT, MFS, Energis, Telewest, Videotron and NYNEX (Explanatory Document), issued July, 1994 by Oftel. This document was issued simultaneously with the actual ADC waiver determinations.

31. The current ADC waiver regime for international calls permits waivers to any ISR operator whose share of the relevant international retail market, as defined by Oftel, does not exceed 25%. Current Oftel policy authorizes the Director-General to waive ADCs for retail call revenues of ISR operators that equal up to 10% of the total U.K. retail revenues generated from designated international services.[49] If a carrier's share of the relevant market exceeds the 25% benchmark, it must pay ADCs on its entire market share. Moreover, there is an aggregate limit on the total amount of international traffic that may be exempted from the ADCs. BT is entitled by the terms of its License to receive ADCs on traffic that accounts for 85% of the revenues of the international market.[50] The Director-General may not,

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[49] For purposes of calculating whether a carrier has a market share in excess of 10% of the total market, or has achieved a total market share in excess of 25%, Oftel has defined the relevant market as being the ISR traffic carried on all designated ISR routes. See Explanatory Document at 5-6, para.22. Market share is calculated on the basis of yearly forecasted retail call revenues of U.K. licensed operators. Oftel computes each operator's estimated market share based on the forecasts of retail call revenues provided by the companies in their business plans, combined with estimates of equivalent revenues of other existing and prospective U.K. operators. See Explanatory Document at 6, para.25.

To determine a carrier's 10% market share, Oftel first calculates the denominator by aggregating all retail international call revenues. This amount includes revenues from the resale of international private lines interconnected to the PSN at one end and two ends on designated ISR routes, as well as international direct dial (IDD) calls on designated ISR routes. Oftel then calculates the numerator by aggregating the individual carrier's retail international call revenues. This amount includes only revenues from the resale of international private lines interconnected to the PSN at one end and two ends. Revenues from IDD calls and transit calls are excluded from the numerator. The market share calculations also include revenues from international calls that originate and terminate on the local network operated by Mercury or other competitors to BT. Oftel calculates a carrier's market share for purposes of applying the 25% threshold in the same manner, except that Oftel includes revenues from IDD calls as part of the numerator. See Explanatory Document, Annex 2 at 13-14.

[50] For purposes of calculating whether the share of the market on which BT fails to recover full ADCs, either implicitly from its own customers or explicitly from interconnecting operators, has exceeded 15%, the relevant market is the market in international calls. To determine the 15% market share, Oftel

therefore, continue to grant ADC waivers if the effect of such additional waivers would be to prevent BT from receiving ADCs on 85% of the revenues of the international market. In other words, Oftel may grant international ADC waivers as long as those waivers do not exempt more than 15% of the revenues of the international market from payment of the contribution.[51]

32. On July 13, 1994, the Director General exercised his waiver authority and granted two-year waivers of ADCs to eight companies.[52] AT&T maintains that this action does not effectively address the ADC concern for resellers because the two-year limit, as well as the 1997 expiration date for Oftel's ability to grant ADC waivers, creates financial uncertainty for the affected ISR operators. ACC and MFS, as two of the eight companies to receive an ADC waiver, state that they have received an acceptable international ADC waiver, and that there are no longer obstacles to finding that the United Kingdom is an equivalent country.[53]

33. Although we share the concerns of AT&T and Telstra about the expiration of the existing ADC waivers in two years and of Oftel's authority to grant ADC waivers in 1997, we note that Oftel has publicly stated that "it recognizes the operators' concerns about the drawbacks of the ADC regime", and "is committed to carrying out a wide ranging review of the future of the ADCs"[54], which is scheduled to begin this Fall.[55] As

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calculates all retail call revenues from the resale of international private lines interconnected to the PSN at two ends on ISR designated routes, at one end on all routes, as well as IDD calls on all routes. See Explanatory Document at 5-6, Annex 2 at 14.

[51] According to the ADC Press Release at 2, BT's access deficit for the year 1992/1993 was £1.45 billion. Based on the 15% threshold, the current maximum value of the waivers is approximately £150 million per annum.

[52] The ADC waivers granted included international, national and local traffic. Oftel granted full international ADC waivers to five companies, including four U.S.-owned carriers: ACC, MFS, Worldcom and City of London Telecommunications (COLT), which is affiliated with Alanna.

[53] See ACC Report on Interconnection at 1, and MFSI Report on Interconnection at 1.

[54] See ADC Press Release at 3.

discussed further below, we believe that we can rely upon Oftel's general policy of granting waivers to ISR operators pending the outcome of the review of the ADC regime. As we observed in our Canadian equivalency determination,[56] all authorizations for the resale of international private lines for the provision of switched services between the United States and a foreign country are contingent upon the foreign market's continuing to afford equivalent resale opportunities. In light of the asserted impact of ADCs on the viability of the U.K. ISR market, the imposition of the current ADCs on U.S.-based ISR licensees would raise a significant issue as to the equivalency of the U.K. resale market. Thus, if in the future U.S.-based ISR licensees are unable to obtain waivers of the current high level of international ADCs, or other comparable relief, we will re-examine the issue of whether the United Kingdom continues to offer U.S.-based carriers resale opportunities equivalent to those available in the United States.

34. AT&T also criticizes the current Oftel ADC waiver policy on the ground these waivers, as a practical matter, will not be available to U.S.-based carriers. Specifically, AT&T contends that, because Mercury's existing ADC waiver equals a 13.5% share of the international market, ADCs due from competitors to BT may be waived on only an additional 1.5% of the international market before the 15% threshold is exceeded.[57] As

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[55] Oftel has committed to carrying out a wide-ranging review of the future of ADCs. If the ADC regime is to be materially changed, Oftel has acknowledged that Oftel will have to consider the effect on BT and the questions of tariff rebalancing and funding of universal service obligations. See ADC Press Release at 3.

[56] See fONOROLA/EMI Order, 7 FCC Rcd at 7312; see also fONOROLA/EMI Order on Recon., 9 FCC Rcd at 4068.

[57] Oftel's calculations determined that in March 1993, Mercury had 19% of the market in international calls, and received a waiver of 10% of the market in international calls. Based on the calculation discussed below, Mercury's ADC waiver amounted to a 13.5% share of the international market, leaving only 1.5% market share on which further waivers could be granted.

To arrive at 13.5%, Oftel disaggregated the 19% market share into 7.5% direct traffic and 11.5% indirect traffic (or a 40:60 ratio). Direct traffic consists of calls that originate from customers directly connected to Mercury, and are not conveyed over BT's local network. Oftel then decided that the 40:60 ratio of direct to indirect calls in Mercury's overall market share should be applied to the first 10% of its market. Accordingly, Oftel calculated that Mercury has a waiver for 6% of the market

AT&T points out, Oftel stated in the Explanatory Document issued in July 1994 that it expects that the 15% benchmark will be surpassed in each of the next two years, which will require retroactive adjustments of ADC waivers to ensure BT's continuing recovery of ADCs from 85% of the international traffic.[58]

35. We believe that Oftel already has moved to address the concerns raised by AT&T with respect to the availability of ADC waivers for resellers. Oftel has stated publicly that it is unlikely that Mercury's waiver for the international market can be renewed at the current level of 10%. Furthermore, Oftel has acknowledged explicitly that a reduction of the waiver granted to Mercury is in accordance with a policy stated in the BT/Mercury interconnection agreement.[59] At that time, Oftel recognized that, as market shares of operators originally granted waivers grow and new entrants appear, it may be desirable to reduce the waiver of the established operator to facilitate the entry of the new operators.[60] In light of this articulated ISR policy and the ISR operators' comments in the record, we are satisfied that there will be sufficient ADC waivers available in the short term to allow multiple ISR operators to engage in viable ISR activity.[61]

36. As noted in footnote 57, supra, Oftel includes in its calculations of the 15% traffic threshold Mercury's direct traffic, now at 7.5%. We share AT&T's concern that the practical

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with respect to its indirect traffic and an implicit waiver for 4% of the market for its direct traffic, for a waiver of 10%. In addition, Oftel determined that Mercury had an additional market share of 3.5% (40% of the remaining 9% of the whole international market) with respect to direct traffic above the 10% benchmark. For purposes of calculating the 15% cap in lost market share for BT, Oftel counts all direct traffic against BT's loss of market share with the result that the total extent of the Mercury waiver amounts to the aggregate of 10% and 3.5%, or 13.5%. See Explanatory Document at 6-7. It appears that even if Mercury were to lose its entire ADC waiver, its 7.5% market share of direct traffic would continue to count against the 15% benchmark, leaving only 7.5% of the market open to further waivers.

[58] See Explanatory Document at 7.

[59] See Explanatory Document at 8, citing Annex C of the BT/Mercury (MCL) determination.

[60] See Explanatory Document at 8.

[61] Oftel is expected to complete its review of the future of the ADC regime before the expiration of the two-year ADC waivers. See MFSI Reply Comments at 10.

effect of this approach is to reduce the actual total percentage of the international market for which ADC waivers are available from 15% to 7.5%.[62] Should the 15% threshold be breached and no alternative relief be provided to ensure the commercial viability of the ISR market for U.S.-based ISR operators, we will be required to review whether the U.K. market for international private line resale still offers equivalent resale opportunities.

37. AT&T also argues that the ADC regime should be either eliminated or modified to provide a blanket exemption to U.S. resellers for payment of ADCs on the termination of calls in the United Kingdom. AT&T's argument is partially premised on its assumption that the ADC waivers apply only to calls that originate over BT's local network in the United Kingdom, not to calls that terminate over BT's local network. If such were the case, there would be a distinct economic disincentive to terminate traffic in the United Kingdom, which would likely result in the diversion of a disproportionate amount of U.S.-inbound, as opposed to U.S-outbound, switched traffic from the settlements process, thus increasing the U.S. settlements payments to U.K. carriers. In response, both ACC and MFSI assert that U.K.-terminated international traffic is not excluded from the application of ADC waivers. Upon review of the record, including ACC's ADC waiver determination and the accompanying Explanatory Document, we find that not only does the plain language of the waiver not support AT&T's argument, but that there is no other evidence that ADC waivers do not apply to all traffic conveyed over BT's local network, regardless of whether it is originating or terminating in the United Kingdom.

38. In sum, we do not agree that we must deny an equivalency finding based on Oftel's interim approach to handling ADCs for ISR operators. First, Oftel has granted ADC waivers to U.S.-based carriers. Second, based on Oftel public statements, we expect that, as the 15% threshold is approached, Oftel will take action to ensure that the existing two-year full ADC waivers remain valid for the complete term and that full ADC waivers will

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[62] Since Oftel includes Mercury's direct traffic in its calculations of the amount of the market remaining open to possible ADC waivers, it appears that any increases in Mercury's market share of direct traffic reduces the percentage of market share on which further ADC waivers may be granted. Furthermore, as this could ultimately place an artificial ceiling on the number of U.S.-based carriers able to engage in commercially viable ISR, Oftel's pro-competitive ISR policy could be obstructed by an indefinite continuation of BT's entitlement to ADCs on 85% of the international market share.

be available for future U.S.-based licensed ISR operators.[63] In consideration of the above, we believe that U.S-based carriers will in the short run be able to compete effectively as ISR operators in the United Kingdom. Moreover, our determination is reinforced by Oftel's explicit recognition that ISR is not commercially viable without relief from payment of the high level of international ADCs and its stated intent to review the future of the ADC regime. Finally, if U.S.-based ISR operators are not afforded relief in the future from the high level of ADCs, we will revisit the issue of whether the United Kingdom affords U.S.-based carriers equivalent resale opportunities.

4. Equal Access and Number Portability

39. Telstra and AT&T argue that the lack of both equal access and number portability in the United Kingdom should preclude an equivalency finding for the United Kingdom. The private line resale applicants, however, claim that, despite the fact that these services are not available, the current market conditions permit them to engage in commercially viable ISR operations in the United Kingdom.[64]

40. With respect to equal access, we note that Oftel issued in November 1993 a consultative document setting out a general framework for undertaking a cost benefit analysis of requiring BT to make equal access available to competing carriers.[65] In light of the mixed response to the equal access consultative document, Oftel recently announced its intention to conduct a full cost benefit analysis to examine the desirability of directing BT to provide equal access in the United Kingdom.[66] Although equal

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[63] Oftel will complete its review of the current Mercury ADC waiver for international calls by October 1994. See Explanatory document at 8.

[64] See ACC Report on Interconnection at 1, and MFSI Report on Interconnection at 1.

[65] See Consultative Document on Cost Benefit Analysis of Equal Access, issued by the Director General of Telecommunications, Oftel, United Kingdom. Condition 13A.3 of BT's license requires the Director General to undertake a cost benefit analysis to demonstrate that the benefits to customers will outweigh the likely costs of its introduction before he may direct BT to provide equal access.

[66] See Oftel's August 9, 1994, Press Release "Don Cruickshank Announces Cost Benefit Analysis for Equal Access". Equal access in the United Kingdom would provide customers with the option of either pre-selecting an operator to convey their long-distance calls or, for each call, the option to dial extra

access may indeed be a preferable approach, our own experience in the domestic toll services market suggests that effective competition through resale can begin to develop even when equal access is not available. We therefore conclude, as we did with respect to Canada, that the lack of equal access does not preclude a finding of equivalency of the U.K. resale market.[67]

41. With regard to number portability, we note that Oftel also completed a cost benefit analysis of number portability in December 1993 and concluded that there was a "strong and robust case for the introduction of number portability".[68] Recently, a technical specification for number portability has been introduced, and, as a result, Oftel directed BT to provide limited number portability[69]. While not dispositive, we found in our analysis of the Canadian market that the lack of number portability did not preclude a finding of Canadian equivalency. Although number portability may enhance the competitiveness of ISR operators, our own market experience indicates that it is not essential for the development of a robust resale market. We do not, therefore, consider the immediate lack of number portability as a disqualifying factor in the equivalency analysis.[70]

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digits to choose which operator would convey that call. Failure to dial the extra digits would result in an incomplete call.

[67] See fONOROLA/EMI Order, 7 FCC Rcd at 7315.

[68] See January 13, 1994, Oftel Press Release "Don Cruickshank Announces Plans for Introduction of Number Portability". Condition 34B.13 of BT's license stipulates as a prerequisite to directing BT to offer number portability that the Director General undertake a cost benefit analysis of introducing number portability, determine its technical feasibility, and require other public telecommunications operators to provide reciprocal portability.

[69] See Oftel Press Release on "Technical Barriers Cleared for Number Portability", released August 24, 1994. Although number portability will be phased in gradually, the Director General expressed his expectation that this option would be widely available for customers during 1995. In the interim, the Director General has directed BT to provide portability as of this autumn for certain BT customers who wish to transfer to the cable operator Videotron.

[70] See fONOROLA/EMI Order on Reconsideration, 9 FCC Rcd at 4068, n. 16.

5. Miscellaneous Terms and Conditions

42. AT&T also asserts that calling line identity (CLI), or in U.S. terms "automatic number identification",[71] and trunk side access are not available to ISR operators and that it is unclear whether common channel signaling or other network capabilities supporting accurate billing are available to ISR operators. AT&T maintains that the unavailability of these features requires ISR operators to make equipment and software investment in the United Kingdom that is not required for resellers to operate in the United States. Since BT's standard interconnection agreement now offers all of these features on a nondiscriminatory basis at standard prices,[72] we find that AT&T's concerns are moot.

43. In addition, Telstra and AT&T allege that there are limitations on the scope of indirect access available to the resellers' networks via the BT network that undermine the development of a viable international resale market in the United Kingdom. Specifically, they state that (i) indirect access requires the ISR operator's customer to dial a 4-digit access code to establish a connection to the ISR operator's switch, but that BT's TXE-4 local exchanges cannot process the 4-digit codes, (ii) that CLI is not available from customers connected to analog switches, and (iii) all calls originating via BT analog local exchanges (approximately 35% of BT's local access lines) entail a two-stage dialling procedure. ACC disputes AT&T's arguments, stating that the indirect access plan offered to ACC is sufficient in that the system provides ACC's customers with nationwide access to ACC's network via the BT system, regardless of the type of local exchanges. ACC argues, moreover, that the TXE-4 exchanges comprise only 7.5% of BT's local exchanges and are not in areas that would adversely affect ACC's indirect access marketing/sales strategy.

44. We note that BT has completed a feasibility study for implementing the capability to use four-digit access codes on its TXE-4 exchanges. As a result of that study, BT has committed to Oftel to implement access code enhancements beginning in April,

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[71] The ANI feature provides the billing telephone number of the calling party to the carrier, which is used primarily to allow carriers to bill.

[72] See BTNA April 29, 1993 Opposition to Petitions to Deny and Response to Comments at 42-43 in its International Section 214 Application, File No. I-T-C-93-126; see also BT Standard Interconnection Agreement with ACC Long Distance UK Ltd. at Appendix 2 and Technical Annex A, Schedules 30-31.

1995 with completion by the beginning of July, 1995.[73] Upon completion, resellers will have indirect access from all local exchanges in the United Kingdom. In the interim, Oftel will consider applications for the temporary allocation of appropriate four-digit codes to provide indirect access to customers located at TXE-4 exchanges.[74] Moreover, BTNA claims that all resellers with the appropriate four digit access codes can obtain indirect access to customers who are served by both analog and digital switches. The appropriate four digit access codes are assigned automatically to all PTO licensees and are available upon request to any ISR licensee. In light of these circumstances, we accept the conclusions of ACC and MFSI that the terms and conditions surrounding the ISR market, including the indirect access plan, provide them with reasonably equivalent opportunities to compete in the United Kingdom.

E. Other Issues

45. AT&T further argues that we should not find the United Kingdom equivalent until BT agrees to lower its U.K. - U.S. accounting rate to .15 Special Drawing Rights (SDRs)[75] which AT&T contends is a more accurate reflection of the costs incurred by BT and AT&T for terminating and originating switched traffic.[76] In the International Resale Order, the Commission expressly stated that one benefit expected from permitting international private line resale between equivalent countries would be the exertion of a downward pressure on above-cost accounting rates. We, thus, did not contemplate requiring cost-based accounting rates as a precondition to an equivalency finding. Although BT's accounting rate falls within the benchmark established by the

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[73] See Letter from Alan Pridmore, Oftel to Michael Taylor, ACC, United Kingdom (dated August 18, 1994).

[74] Id.

[75] An SDR is a basket of currencies established by the International Monetary Fund.

[76] We note that BT has negotiated a .33 SDRs U.S. - U.K. accounting rate for international message telephone service (IMTS) in correspondence with IDB and MCI. The effective accounting rate for IMTS is .44/.35 SDRs (peak/off peak). Prior to the negotiation of the .33 SDRs accounting rate, AT&T, Sprint, IDB and MCI had each submitted to the Commission a proposal of, inter alia, .31 SDRs for country-direct services and .34 SDRs for other IMTS services. Staff withheld approval of each proposal. Subsequently, IDB and MCI withdrew the original proposal and filed a new proposal to change the IMTS accounting rate to .33 SDRs.

Commission in 1992,[77] we agree with AT&T that much more progress must be made toward cost-based accounting rates. Nonetheless, we do not consider that this issue is relevant to our action on Section 214 resale applications of two U.S. common carriers that have no control over the current level of negotiated accounting rates between U.S. and U.K. facilities-based carriers.

46. AT&T also contends that a finding of U.K. equivalency would permit the rerouting of switched traffic from third countries via the United Kingdom to the United States over resold international private lines. AT&T points out that the United Kingdom permits carriers to transit ISR traffic that originates in another country through the United Kingdom to terminate in a third country, as long as it has been designated equivalent by the United Kingdom.

47. In general, we do not believe that our international resale policy would be undermined by the routing of U.S. international private line traffic through one "equivalent" country to a third "equivalent" country,[78] provided that the U.S. reseller is authorized to provide service to the third country and that this Commission has determined that the third country offers equivalent resale opportunities. AT&T argues, however, that the United Kingdom's policy will have an adverse impact on the U.S. net settlements deficit with Sweden and Australia, since the United Kingdom has found those countries to be equivalent, but the United States has not made that determination.[79] AT&T also maintains that the European Union's (EU) definition of a Closed User Group (CUG)[80] would permit the routing of switched

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[77] See In the Matter of Regulation of International Accounting Rates, Phase I, Second Report and Order (Benchmark Order), 7 FCC Rcd 8040 (1992), recon. pending.

[78] See fONOROLA/EMI Order on Recon., 9 FCC Rcd at 4070. We made an exception to this general approach in the case of Canada. Because of the unique routing restrictions in place in Canada, the Commission limited the use of resold international private lines to the carriage of U.S. - Canada traffic only, regardless of whether the third country has been determined equivalent.

[79] To date, there is a near balance in settlements between the United States and both Sweden and Australia.

[80] In the EU, Member States may only restrict the provision of voice telephony service to the public to its own telecommunications operators, such as France Telecom in France or Deutsche Telekom in Germany. Member States may not reserve those services which are not provided to the public. The EU term "closed user group" is used to designate what is not considered to be service "to the public". The EU has indicated that Member

traffic from any of the EU's Member States via U.K. - U.S. international private lines, which would have an adverse impact on U.S. net settlements with the other Member States.[81]

48. AT&T argues that the Commission's routine imposition of routing restrictions as conditions on individual Section 214 authorizations will not prevent the rerouting of U.S.-destined traffic through the United Kingdom. According to AT&T, the only effective means of addressing these routing concerns is to obtain the United Kingdom's commitment to grant U.S. carriers international facilities-based licenses to compete directly with BT for such traffic at European TEUREM accounting rates.[82]

49. AT&T's argument misperceives the purpose of our international resale policies. Our equivalency requirement is aimed at ensuring that U.S.-based carriers are afforded equivalent resale opportunities, not facilities-based market access. Although we agree with AT&T that facilities-based market access is an important goal, the premise of our international resale policy is that, even before facilities-based competition is possible, private line resale provides additional competitive pressures in foreign markets that could lead to lower accounting rates and prices for consumers. Accordingly, we deny AT&T's request to withhold an equivalency finding until and unless the United Kingdom allows U.S.-based carriers to provide international facilities-based services.

50. Moreover, while we share AT&T's concern over the potential for unauthorized routing of switched traffic over

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States are not to interpret the term "to the public" too broadly so as to include communications between an identifiable group of users who have such existing commercial or common links between them that they could not be regarded as the public. An example of what may constitute a CUG would be communications between members of an integrated business community encompassing a corporation, partially-owned subsidiaries, its employees working outside company premises, major suppliers and customers or dealers.

[81] Based on our understanding of Article 58 of the Treaty of Rome, which basically serves as the constitution of the EU, any U.S. company established in one of the Member States may engage in the provision of switched voice services to CUGs on the same basis as any EU company.

[82] TEUREM rates are the accounting rates established for originating or terminating switched traffic among the Tariff Group for Europe and Mediterranean Basin (TEUREM).

international private lines,[83] we do not agree with AT&T's wholesale characterization of Section 214 routing restrictions as an ineffective means to prevent or deter the unauthorized use of international private lines to bypass our equivalency requirement. As CWI notes, U.S. carriers that violate conditions of their Section 214 authorizations risk substantial fines and forfeitures, including revocation of their authorizations. We therefore intend to monitor the traffic reports for any detectable shift in traffic patterns between the United States and EU Member States[84] which may be attributable to such unauthorized bypass.

51. While current annual traffic reports[85] provide us with adequate data to monitor general international traffic patterns, there is a significant time delay between the initiation of the private line resale offerings and release of this data. We are

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[83] Given the nature of the restrictions on the public access and usage of the CUGs, we believe, however, that the traffic carried over CUG networks is likely to be limited in volume.

[84] The European Union is comprised of the following twelve (12) Member States: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.

[85] U.S. carriers, including private line resellers, that provide international communications services are required to final annual reports with the Commission pursuant to Section 43.61, 47 C.F.R. §43.61 of the Commission's Rules that summarize service to and from the United States and other countries and locations throughout the world. The data submitted in these reports include billed messages, settlement minutes, revenue billed to customers in the United States, settlement payments owed to foreign correspondents on U.S. billed service, and settlement payments owed on to U.S. carriers on foreign billed service. These reports also require detailed information on private line and leased circuit services, including the number of leased channels and associated revenues for service between the various U.S. points and other locations for each service classification. In addition, the Commission collects and catalogues data on accounting rates pursuant to Section 43.51 of the Commission's Rules. The combination of accounting rate data and traffic and revenue information enables the Commission to track and analyze changes in accounting rates for each country or location and to detect any significant changes in service between the United States and other countries that deviate substantially from historic patterns. Moreover, since each carrier must file a report with the Commission, shifts of service among carriers, including resellers, can be discerned.

concerned that these reports may not be frequent enough to enable the Commission to monitor effectively the initial implementation of international private line resale between the United States and the United Kingdom. To provide a more timely means of ensuring that our international policy is having its intended effect, we require all nondominant international private line resellers providing switched or interconnected international private line services between the United States and the United Kingdom during the first three years after this equivalency finding to file with the Commission on a semi-annual basis the information contained in the annual traffic reports.[86] After the first three years of equivalency, nondominant international private line resellers need only file traffic reports on an annual basis pursuant to Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

52. Despite these more frequent reports, we recognize that we may not be able to discern immediately more subtle shifts in traffic patterns which could indicate that unauthorized third country traffic is being rerouted through the United Kingdom. We nevertheless believe, on balance, that the public interest benefits expected from the introduction of international private line resale to the United Kingdom outweigh the potential impact on the international settlements process from the unauthorized routing of switched traffic to private lines.

53. As a final matter, AT&T argues that carriers competing with BT have no effective means of redress for unduly discriminatory practices, or other anticompetitive actions by BT. First, we understand that Oftel has the authority to respond to complaints about BT's conduct and enforce BT's license requirements, including the obligation of nondiscrimination. While Oftel may not penalize BT through the imposition of fines or forfeitures, any breach of BT's license condition may result in an enforcement order and any abuse of its dominant position

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[86] As we did for international private line resellers between the United States and Canada, see fONOROLA/EMI Order on Recon., 9 FCC Rcd at 4070, we shall condition each Section 214 authorization granted to a nondominant international private line reseller with the requirement to file a semi-annual report with the Commission not later than September 30 for the first six-month calendar period, and March 31 for the second six-month calendar period. We note that this policy does not apply to dominant international private line resellers, which are subject to the more stringent requirement of filing quarterly traffic reports with the Commission.

may result in Oftel's amendment of BT's license.[87] Should BT not accept such an amendment to its license, Oftel may refer the matter to the Monopolies and Mergers Commission (MMC), which is the U.K.'s principal body for antitrust matters,[88] and ultimately to the House of Lords for review.[89] Thus, while the regulator's authority to impose fines and forfeitures would be a deterrent to anticompetitive conduct, we believe that other effective means of redress to protect competition in the marketplace exist in the U.K. environment.

54. In evaluating the equivalency of the U.K. resale market, we recognize that the United Kingdom has not yet designated the United States as equivalent and, as a result, that resale of international private lines interconnected at both ends cannot occur until such time as it does so. One of the essential criteria for our equivalency determination is that the foreign country permit international private lines to be interconnected to the PSN at both ends. Under its equivalency approach, the United Kingdom permits two-end interconnection of international private lines only to countries designated as equivalent. To date, the United Kingdom has designated Canada, Australia and Sweden as equivalent countries. As a result, ISR operators, including U.S.-based ISR operators, may interconnect their international private lines to the PSNs at the U.K. end and either the Swedish, Australian, or Canadian end.

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[87] We note that there is no private right of action to enforce a breach of a license condition. If Oftel is satisfied that BT has breached a condition and is likely to do so again, Oftel must issue an enforcement order. In cases of emergency, if Oftel believes that a breach has occurred and will recur, Oftel may issue an interim order. The issuance of an Oftel order (interim or final) gives rise to private rights at law. Thus, any party injured by a breach of an order may bring action in the High Court for damages and/or injunctive relief. Breach of a High Court injunction is punishable by an unlimited fine and/or imprisonment. See U.K. Telecom Act, Part II, §§ 13-15. Finally, even where Oftel objects to behavior by BT that is not directly regulated by its license conditions, Oftel may take action under U.K. competition laws or amend BT's license.

[88] The MMC examines the effect of the referred matters on the public interest. If the MMC finds that there is an adverse effect, it may recommend an amendment to BT's license condition which is then required to be implemented by Oftel. See U.K. Telecom Act, Part II, §§ 16-18.

[89] Mercury, for example, is appealing to the House of Lords an issue concerning the interpretation of Condition 13 of BT's License which addresses BT's interconnection obligations. See Mercury's U.K. Press Release of August 19, 1994.

55. We remain concerned about the disparity between the United States and the United Kingdom in the regulatory treatment of one-end interconnection of resold international private lines pending a U.K. determination of equivalency for the United States. Pursuant to our international private line resale policy, one-end interconnection of international private lines is subject to the same equivalency requirement as two-end interconnection, while the U.K. approach permits one-end interconnection without any equivalency determination and pursuant to the class TSL.[90] Thus, until the United Kingdom designates the United States as an equivalent country, international private line resellers may only interconnect one end of an international private line between the United States and the United Kingdom. While we do not require authorized international private line resellers to interconnect their international private lines at both ends, we do not believe that the goals of our international private line resale policy, including exerting downward pressure on international accounting rates, are advanced by creating a situation where only one-end interconnection between the United States and the United Kingdom may occur.[91] We, therefore, grant the applicants' Section 214 authorization for international private line resale subject to the condition that they may not initiate service until and unless the United Kingdom designates the United States an equivalent country.[92]

56. Finally, we recognize that some of the concerns raised in the record have been addressed by interim U.K. policies only. While we would prefer greater certainty on several issues, such as the ADCs and the potential for a retroactive upward adjustment of the interconnect prices, we fully expect that the final measures taken by Oftel will continue to advance the U.K.'s open and pro-competitive telecommunications policy. We believe that the interim regulatory measures satisfactorily address our immediate concerns about the commercial viability of the U.K. ISR market, and, therefore, that the importance of international

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[90] See para. 14 and note 28, supra.

[91] While AT&T suggests that we authorize resale of international private lines interconnected at the U.K.-end only as a test of the equivalency of the U.K. market, we do not believe that the goals of our international resale policy, including lower accounting rates and foreign collection rates, would be furthered by such an approach, and therefore, deny AT&T's request.

[92] We note that ACC stated that it would have no objection to the conditioning of a Commission equivalency finding upon the designation of the United States as equivalent by the United Kingdom. See ACC Application at 16.

private line resale to the furthering of the public interest in such matters as new international services, lower accounting rates, and lower customer costs outweighs our long-term concerns. If, however, the legal, regulatory and market conditions that emerge in the United Kingdom are such that ISR is not commercially viable, then we will review this equivalency finding.

IV. CONCLUSION

57. In conclusion, we find that the United Kingdom provides open entry for, and nondiscriminatory treatment of, U.S.-based carriers, as well as the ability to interconnect international private lines to the PSN at both ends. In addition, we conclude, on balance, that the terms and conditions associated with the provision of international private line services in the United Kingdom are substantially equivalent to those available in the United States. Furthermore, we believe that the introduction of international private line resale between the United States and the United Kingdom promotes the introduction of new international telecommunications services at lower prices and new entry into the international telecommunications market, and advances the goal of achieving the global information infrastructure. We find it necessary, however, to grant the ACC and Alanna applications subject to the condition that the United Kingdom designate the United States as an equivalent country before the applicants may engage in the services we authorize in this order.

V. ORDERING CLAUSES

58. Upon consideration of the applications and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and public convenience and necessity require the provision of resale of international private lines for the provision of switched services between the United States and the United Kingdom.

59. Accordingly, IT IS HEREBY ORDERED that applications File Nos. I-T-C-93-035 and I-T-C-93-042 ARE GRANTED, and (i) ACC is authorized to resell international private lines for the provision of switched services, including operator assisted services, between the United States and the United Kingdom and (ii) Alanna is authorized to resell international private lines interconnected for the provision of switched services, including voice and data, between the United States and the United Kingdom, subject to the condition set forth in para. 60, infra.

60. IT IS FURTHER ORDERED that neither ACC nor Alanna may initiate their international private line resale services authorized herein until the United Kingdom has designated the United States as an equivalent country.

61. IT IS FURTHER ORDERED that ACC and Alanna are authorized to lease up to twenty (20) DS-1 and up to two (2) E-1 circuits, respectively, pursuant to the tariffs of appropriately authorized U.S. carriers, for the provision of their authorized resale of international private lines between the United States and the United Kingdom.

62. IT IS FURTHER ORDERED that the authority granted herein to resell international private lines for the provision of switched services between the United States and the United Kingdom is limited to the provision of such services between the United States and the United Kingdom only -- that is, private lines which carry traffic that originates in the United States, and terminates in the United Kingdom, or traffic that originates in the United Kingdom, and terminates in the United States.

63. IT IS FURTHER ORDERED that neither applicant nor any persons or companies directly or indirectly controlling them or controlled by them, or under direct or indirect common control with either of them, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which either applicant or any such persons or companies are parties.

64. IT IS FURTHER ORDERED that each applicant shall file a copy of any operating agreement it enters into with its foreign correspondents within thirty (30) days of execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

65. IT IS FURTHER ORDERED that the applicants shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61 for the services authorized in this Order.

66. IT IS FURTHER ORDERED that the applicants, as nondominant international private line resellers, shall file on a semi-annual basis with the Commission the information contained in the annual reports of overseas telecommunications traffic filed pursuant to Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

67. IT IS FURTHER ORDERED that the applicants shall file semi-annual circuit additions to certificated points, pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

68. IT IS FURTHER ORDERED that the applicants shall file all arrangements for private line interconnection to the U.S. public switched network, pursuant to Section 43.51(a), 47 C.F.R. §43.51(a).

69. IT IS FURTHER ORDERED that grant of these authorizations is conditioned upon the United Kingdom's continuing to afford resale opportunities equivalent to those afforded under U.S. law.

70. IT IS FURTHER ORDERED that this order may be subject to future modification or revocation pursuant to the outcome of the Phase II Third Further Notice, 7 FCC Rcd 8040 (1992), and any other relevant proceedings.

71. This Order is effective upon release. Petitions for reconsideration under Section 1.106 of the Commission's Rules may be filed within 30 days of public notice, which is the date of release, of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

SEPARATE STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

Re: ***Applications of ACC Global Corp. and Alanna Inc. to Resell International Private Lines for the Provision of Switched Services Between the United States and the United Kingdom***

I support the foundational finding of equivalency in this item. After careful review of the facts and circumstances under the tri-partite test enunciated in our ***International Resale Order***, 7 FCC Rcd 559 (1992), this Commission finds that, on balance, the United Kingdom affords domestic carriers resale opportunities that are equivalent to those available under United States law; therefore, this Commission approves the instant 214 applications. This Memorandum Opinion, Order and Certification is a comprehensive evaluation of the regulatory status of the international simple resale in the United Kingdom.

This MO&O and Certification applies the Commission's test for equivalency and finds that the U.K. affords U.S.-based carriers: (1) open entry; (2) non-discriminatory treatment, and (3) inter-connection to the public switched network (PSN) at both ends. The finding of overall equivalency is based in part on the good faith efforts of the U.S. Federal Communication Commission's counterpart in the United Kingdom -- Oftel -- to ensure open entry, interconnection, and non-discrimination for U.S.-based carriers.

The MO&O and Certification addresses a number of concerns primarily raised by AT&T. In essence, AT&T sought assurances that they would not be discriminated against. Although it is not for this Commission to dictate regulatory policy in other countries, we can lead by example -- as we have done in the area of international simple resale. It is also proper for this Commission to rely on the assurances of our regulatory counterparts as developed in on-going bi- and multi-lateral discussions.

Accordingly, we will adjudge a finding of equivalency and impose certain conditions and reporting requirements. Significantly, we explicitly retain discretion to review the finding in light of subsequent developments. We will revisit the matter promptly if Oftel does not continue to make significant regulatory efforts to provide nondiscriminatory treatment to U.S.-based carriers.

In conclusion, I support the finding of equivalency and concomitant grant of the pending 214 applications to provide international simple resale because of, ***inter alia***:

(1) the commitments made by Oftel to review certain policies such as number portability and access deficit contributions (ADC's);
(2) the explicit statement in the MO&O and Certification that the FCC will review this decision if Oftel does not grant waivers of ADC's to U.S.-based providers in a non-discriminatory fashion; and
(3) the explicit pre-requisite that the United Kingdom must designate the United States as equivalent before the applicants can initiate their international private line resale services.

FCC 94-255

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of	)	**MM Docket No. 94-34**
Commission's Equal	)	
Employment Opportunity Rules	)	

REPORT

Adopted: October 5, 1994; Released: October 5, 1994

By the Commission: Commissioner Ness issuing a separate statement.

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I. EXECUTIVE SUMMARY

In Section 22(a) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress made the following findings with respect to equal employment opportunity:

> "(1) despite the existence of regulations governing equal employment opportunity, females and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries;
>
> (2) increased numbers of females and minorities in positions of management authority in the cable and broadcast television industries advances the Nation's policy favoring diversity in the expression of views in the electronic media; and
>
> (3) rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination."

Based on the foregoing findings, Congress amended the Communications Act of 1934, inter alia, to require the Commission to amend its EEO rules and reporting requirements with respect to cable television stations and to include multichannel video programming distributors (MVPDs) within the scope of the Commission's cable EEO rules. Congress also directed the Commission to commence mid-term reviews of television broadcast stations' employment practices and to inform such stations of necessary improvements in recruitment practices identified as a consequence of such review. Additionally, in Section 22(g) of the 1992 Cable Act, Congress directed that:

> Not later than 2 years after the date of enactment of this Act, the Commission shall submit to the Congress a report pursuant to a proceeding to review and obtain public comment on the effect and operation of the amendments made by this section. In conducting such review, the Commission shall consider the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting equality of employment opportunity and promotion opportunity, and particularly the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority.

In Section 22(g), Congress also directed that:

> The Commission shall forward to the Congress such legislative recommendations to improve equal employment opportunity in the broadcasting and cable industries as it deems necessary.

In compliance with the foregoing amendments to the Communications Act, the Commission initiated a rule making and implemented the changes to its EEO rules mandated by Congress. Further, the Commission, as directed by Congress, adopted a Notice of Inquiry to seek public comment on: the effectiveness of our EEO rules, procedures, policies, standards, and guidelines; the effect and operation of the amendments made by the 1992 Cable Act; and proposals for changes to our rules to improve their operation and effectiveness. The Report addresses these concerns.

Review of EEO Policies and Practices

First, the Report contains an extensive background discussion of the origins and history of our broadcast and cable EEO rules and policies, from 1968, when our involvement in the broadcast EEO area began, to the present. The Report details how our original EEO policies and rules were adopted, discusses how these policies and rules expanded and developed, and describes our current efforts-based EEO analysis. The Report also discusses our 1994 Policy Statement, which established non-binding guidelines for assessing forfeitures for violations of the Commission's broadcast EEO rule.

Analysis of EEO Effectiveness

Second, to assess the effectiveness of our EEO rules and policies, the Report contains a statistical examination of female and minority representation in broadcast and cable employment between 1986 and 1993. The examination reflects that the employment of women and minorities in the broadcast and cable industries increased from 1986 to 1993 in overall and total upper-level positions, as well as in each of the upper-level job categories. In fact, the data show that most of these increases outpaced the 1.1% growth of women employees and the 2.1% growth of minority employees overall in the national workforce. Thus, while the broadcast industry has been downsizing from 1986 to 1993, the percentage of women and minorities in all job categories has been increasing.

The Report concludes that our present policies have been and are effective in promoting equal employment opportunity in the broadcast and cable industries. However, our examination also suggests a continued need for EEO monitoring, as the 1993 percentages of women in the broadcast and cable industries and minorities in the broadcast industry overall remain below comparable figures for the 1993 overall national workforce. Also, individual cases sanctioned for EEO violations establish a

need for further EEO monitoring.

Comments Filed

Third, the Report discusses the comments received in response to our Notice of Inquiry, established pursuant to Congressional directive, which sought comments on the effect and operation of the equal employment opportunity amendments made by the 1992 Cable Act and on the general effectiveness of the Commission's rules, procedures, policies, standards and guidelines in promoting equality of employment opportunity in the cable, broadcast and other industries.

Need for Further Review

While the Report concludes that our EEO rules and policies are effective and must continue, it also concludes that more progress can and should be achieved. To try to improve and refine its EEO policies, the Commission has established a new Office of Communications Business Opportunities (OCBO), which will, inter alia, coordinate and oversee the FCC's EEO practices; support the creation and expansion of small, minority and female-owned communications businesses; coordinate Commission-wide EEO enforcement activities; make policy recommendations to the Commission regarding EEO matters; coordinate with other government agencies that have EEO responsibilities; promote employment opportunities for minorities and women within the communications industry; and engage in long-range planning in the EEO area.

Further, the Report enumerates areas and concerns raised in comments filed in response to our Notice of Inquiry that may warrant further exploration. These include, but are not limited to: (1) the relevance with respect to our broadcast EEO policies of market size or staff size and part-time employees; (2) how to encourage joint recruitment efforts; (3) whether our broadcast filing requirements are unduly burdensome, and, if so, whether they can be streamlined; (4) suggested changes to our mid-term TV review procedures; (5) possible further in-depth analysis of our EEO Policy Statement; and (6) possible improvements to our broadcast renewal application forms and annual employment report forms. The Report notes, however, that the 1992 Cable Act states that "[e]xcept as specifically provided in this section, the Commission shall not revise ... the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. Section 73.2080) as such regulations apply to television broadcast station licensees and permittees; or ... the forms used by such licensees and permittees to report pertinent employment data to the Commission."[1] Additional review is also warranted in

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[1] 47 U.S.C. § 334.

response to comments about our cable EEO rules, particularly with respect to: the relevant labor force statistics to be used in EEO reviews; the effectiveness of the cable annual employment report forms; and how we might improve notification of cable operators, MVPDs and the public concerning various EEO requirements. The Report directs the Commission staff to determine and recommend to it the appropriate procedural vehicle for addressing all of the foregoing issues.

Long-Term EEO Monitoring

The Report also states our intention to institute a more extensive and far-reaching analysis of our EEO program to adapt our rules and policies to the telecommunications marketplace and workplace of the twenty-first century. We are on the brink of a huge and dramatic shift in our telecommunications infrastructure. The anticipated conversion of our information and communications delivery systems to digital technology will result in the technological convergence of those communications delivery systems, as well as the development of new communications services that can deliver voice, video and data. Although our EEO policies now apply to multichannel video programming distributors, thus applying to some new technologies, the current EEO enforcement and regulatory structure otherwise focuses mainly on broadcasters and cable system operators.

The Report states that we would consider broadening our current EEO policies to include a wider range of new and emerging communications technologies and industries and making other fundamental changes. Such expansion of our policies may be warranted to achieve regulatory parity in our EEO enforcement, given the convergence of telecommunications technologies. Broadening our EEO rules also may be justifiable based on the national goal of promoting participation by women and minorities in the design and deployment of advanced telecommunications services and technologies. Further, in light of technological convergence, imposing separate and unique EEO requirements on different telecommunications services may no longer be warranted.

The Report directs the staff to determine the best methods for addressing the EEO issues arising from technological convergence and the communications revolution. Our EEO policies and goals must be reviewed with reference to the entire industry, not just individual communications services. To guide us in our comprehensive analysis as to how to redesign and redirect our EEO policies thoroughly to reflect the communications revolution and bring those policies into the twenty-first century, we express our intent to solicit viewpoints and data from a wide range of entities, including public interest groups, consumer groups, labor groups, trade associations, think tanks, civil rights groups, academics, other government agencies, and the communications industry. It is expected that the OCBO will play

a primary role in this review and analysis. We also will seek additional population and workforce data, as well as projections about the future and statistical and economic data, as a foundation on which to build the Commission's enhanced EEO regulatory structure. Finally, we will explore the extent to which training and internship programs might serve to complement our EEO policies.

II. INTRODUCTION

1. This Report is submitted pursuant to the requirements of the Cable Television Consumer Protection and Competition Act of 1992.[2] In the 1992 Cable Act, Congress stated that it found that "minorities and females are not employed in significant numbers in positions of management authority in the cable and broadcast television industries."[3] Therefore, Congress amended the Communications Act[4] and directed the Federal Communications Commission ("FCC" or "Commission") to revise its Equal Employment Opportunity (EEO) rules to implement the amendments. To assist in a review of the revised rules, Congress directed the Commission to prepare a report and forward "such legislative recommendations to improve equal employment opportunities in the broadcasting and cable industries as it deems necessary."[5]

2. Notice of Inquiry. The Commission initiated its review by adopting a comprehensive Notice of Inquiry ("NOI") on April 21, 1994.[6] In the NOI, we sought comment on the effectiveness of the amendments to the EEO provisions of the Communications Act of

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[2] Pub. L. No. 102-385, 106 Stat. 1460 (amending the Communications Act of 1934 and codified at 47 U.S.C. § 151, et seq.) (hereinafter "1992 Cable Act" or "Cable Act of 1992").

[3] Section 22(a)(1) of the 1992 Cable Act, 47 U.S.C. § 554(a)(1). See also H.R. Rep. No. 628, 102d Cong., 2d Sess. at 111 (1992).

[4] See infra pp. 18 and 21-22.

[5] Section 22(g) of the 1992 Cable Act required that:

> Not later than 2 years after the date of enactment of this Act, the Commission shall submit to the Congress a report pursuant to a proceeding to review and obtain public comment on the effect and operation of the amendments made by this section. In conducting such review, the Commission shall consider the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting equality of employment opportunity and promotion opportunity, and particularly the effectiveness of its procedures, regulations, policies, standards, and guidelines in promoting the congressional policy favoring increased employment opportunity for women and minorities in positions of management authority.

[6] MM Docket No. 94-34, 9 FCC Rcd 2047 (1994).

1934[7] made in the 1992 Cable Act as well as the Commission's rules, procedures, policies, standards and guidelines in promoting equality of employment opportunity and promotion opportunity in the cable and broadcast industries; on questions and proposals regarding possible changes to the Commission's EEO rules, policies and enforcement thereof; and on how to further, to the greatest extent possible, the goals of Congress and the Commission with regard to minority and female representation in management positions. Finally, the Commission asked whether its EEO rules should be expanded to include entities other than broadcasters, cable operators and multichannel video programming distributors ("MVPDs"). In response to the NOI, we received more than 70 comments and seven reply comments.[8] In this Report, we detail the history of broadcast and cable EEO enforcement at the Commission; present employment statistics reflecting the increase in minority and female employment in the broadcast industries from 1986 to 1993 and compare those figures to the national workforce; summarize comments received in response to the NOI; and discuss our observations of the current status of the communications industry and predictions for its future.

3. Review of our current EEO policies reveals that they have been and are effective in promoting equal employment opportunities in the broadcast and cable industries. However, our review also indicates that, given the information elicited as a result of the NOI, the emergence of new technologies, and the mergers occurring in the telecommunications industry, it is essential that we continue to examine our current EEO rules to make them as meaningful and relevant as possible without unnecessary or burdensome restrictions. At the same time, it is imperative that we undertake a long-term analysis of our EEO policies to determine the most appropriate way to monitor EEO compliance in the future for communications industries in general.

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[7] Sections 334 and 634 of the Communications Act of 1934, as amended, 47 U.S.C §§ 334 and 554.

[8] A list of commenters and reply commenters appears in Appendix A. Comments originally were due on May 23, 1994, and reply comments on June 7, 1994. By Order, DA 94-495 (released May 16, 1994), the Commission extended the deadline for comments to June 13, 1994, and for reply comments to June 28, 1994. A few commenters filed in an untimely fashion. However, in the interest of compiling as complete a record as possible, we hereby accept those pleadings.

III. REVIEW OF EEO POLICY AND PRACTICES

A. Broadcast

4. Commission involvement in the broadcast EEO area began in 1968 when it considered a petition filed by the United Church of Christ ("UCC"). UCC sought the adoption of a rule that would prohibit a station from acquiring a Commission license if that station engaged in discrimination in employment practices on the basis of race, color, religion, or national origin. In response to UCC's petition, the Commission on July 3, 1968, adopted a Memorandum Opinion and Order and Notice of Proposed Rulemaking.[9] In this proceeding, the Commission noted that it had consulted with the Equal Employment Opportunity Commission (EEOC) and the Justice Department as a prelude to taking any enforcement action in this area. As a result of its consideration of UCC's petition, related pleadings and consultations with the EEOC and the Justice Department, the Commission recognized that there was a national policy against discrimination in employment on the basis of race, religion, sex, or nationality and concluded that, because of the national policy against discrimination and the fact that broadcasters are licensed pursuant to, and must operate consistent with, a public interest mandate, discrimination allegations could be considered in deciding whether to grant a broadcast authorization. The Commission expressed its view that deliberate discrimination in employment may be inconsistent with the responsibility of each broadcaster to make a bona fide effort to ascertain and serve all elements of its community.[10]

5. In the 1968 Memorandum Opinion and Order, the Commission announced its intention to act on substantial complaints of discrimination whether by referral to the appropriate state or federal agency with primary jurisdiction or on its own motion where no such agency existed. In addition, the Commission stated that, where a complaint raised a substantial issue of discrimination against a station, it would refer the complaint to the EEOC and thereafter maintain appropriate liaison with that agency. If such an issue was raised in a complaint and it was covered by local or state fair employment laws, the Commission stated that it would refer the complaint to the appropriate state or local authority. In either case, the Commission asserted that

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[9] See Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 FCC 2d 766 (1968)("1968 Memorandum Opinion and Order").

[10] Id. at 770.

action on a major application[11] would await resolution of the referral and, if the results of the liaison indicated that there was a substantial issue, the application would be designated for hearing. Alternatively, the Commission contended that if the complaint did not fall within either federal or state civil rights provisions the Commission itself would act upon the complaint in accordance with the above-stated policy.[12]

6. In response to concerns that the Commission's policy would duplicate that of the EEOC, a letter from the Department of Justice appended to the 1968 Memorandum Opinion and Order pointed out that the Commission would be providing nondiscrimination coverage to many licensees not within the terms of Federal or state statutes as well as providing a significant added incentive toward compliance by broadcast licensees with existing provisions of law. The letter also stated that "[b]ecause of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries."[13]

7. In the same proceeding, the Commission implemented its nondiscrimination rules in a Report and Order adopted on June 4, 1969.[14] The rules stated as follows:

> Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated standard, FM, television or international broadcast stations to all qualified persons, and no person shall be discriminated against in employment because of race, color, religion, or national origin.[15]

In adopting these rules, the Commission reiterated its previous

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[11] While the Commission did not define the term, "major application" in its decision, elsewhere in the decision it referred to action on renewal and construction permit applications.

[12] Id. at 771.

[13] Id. at 777.

[14] See Petition For Rulemaking To Require Broadcast Licensees To Show Nondiscrimination in Their Employment Practices, 18 FCC 2d 240 (1969) ("1969 Report and Order").

[15] Id. at 245.

view that discriminatory employment practices are incompatible with a station's operation in the public interest.

8. In its 1969 Report and Order, the Commission not only adopted rules forbidding discrimination, but also adopted rules requiring: that stations establish, maintain and carry out a positive continuing program of specific practices designed to assure equal employment opportunity in every aspect of station employment policy and practice; and that stations' EEO programs address issues such as program dissemination, recruitment, managerial accountability and self-evaluation.[16] The Commission stated that a formal rule was necessary because it agreed with the arguments put forth by some commenters that its EEO policy could not be effectively implemented by relying solely upon individual complaints. Moreover, the Commission added that reliance solely upon a complaint procedure to implement equal employment opportunity could not resolve general patterns of discrimination developed out of indifference as much as out of outright bias. The Commission concluded that a formal EEO rule was necessary to emphasize its policy, make it specific, and make available the remedy of forfeitures for noncompliance.

9. In 1969, the Commission issued a Further Notice of Proposed Rulemaking[17] in the same proceeding and, in 1970, it adopted a Report and Order which implemented additional EEO rules.[18] These rules required each licensee with five or more full-time employees to submit with its renewal application a written equal employment opportunity program designed to ensure nondiscrimination in recruitment, selection and hiring, placement and promotion, as well as in other areas of employment. The Commission also adopted a rule requiring each licensee with five or more full-time employees to file an annual statistical profile report (FCC Form 395). The Commission explained that these changes were intended to provide useful statistical data and to ensure that licensees would focus on the best method of assuring effective equal employment practices.

10. In the 1970 Report and Order, the Commission for the first time added gender as a category to the nondiscrimination rules, in response to comments made in response to the 1969 Further Notice of Proposed Rulemaking. The Commission stated that no

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[16] Id.

[17] See Petition For Rulemaking To Require Broadcast Licensees To Show Nondiscrimination in Their Employment Practices, 18 FCC 2d 249 (1969).

[18] See Petition For Rulemaking To Require Broadcast Licensees To Show Nondiscrimination in Their Employment Practices, 23 FCC 2d 430 (1970) ("1970 Report and Order").

station should discriminate on the basis of sex and that the national policy in this regard should be reflected in its rules. Since that time, no additional protected groups have been added to the broadcast nondiscrimination provisions of our rules.

11. Also in 1970, the National Organization for Women filed a Petition for Rulemaking, asking that broadcast licensees be required to file with the Commission programs designed to ensure equal employment opportunities for women. In a 1971 Report and Order, the Commission amended its rules to require written equal employment opportunity programs applicable to women as well as minority group members. The Commission stated that it is necessary to focus on those groups that comprise a substantial portion of the population and that have in the past suffered from discrimination in employment. It contended that women clearly fall within the confines of these criteria because they constitute over 50% of the population and have a long history of employment discrimination.[19]

12. In a 1975 Notice of Inquiry and Notice of Proposed Rulemaking, the FCC stated that its current EEO guidelines failed adequately to describe and exemplify the measures which licensees should undertake to promote the full realization of equal employment for all individuals. The Commission proposed adopting a model EEO program requirement to ensure a more positive and result-oriented formulation and implementation of licensees' EEO programs.[20] In a 1976 Report and Order, the Commission adopted a rule requiring that applicants for renewal of license who have not previously done so file with the Commission a Model Equal Employment Opportunity Program (Form 396) designed to provide equal employment opportunity for minorities and women.[21] The Program consisted of ten separate sections, including dissemination of the licensee's EEO policies, recruitment, training and job hires.[22] In sum, the Commission believed that

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[19] See Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 315, 340 and 342, and Adding The Equal Employment Program Filing Requirement To Commission Rules 73.125, 73.301, 73.599, 73.680 and 73.793, 32 FCC 2d 708 (1971).

[20] See Nondiscrimination In the Employment Policies and Practices of Broadcast Licensees, 54 FCC 2d 354 (1975).

[21] See Nondiscrimination In the Employment Policies and Practices of Broadcast Licensees, 60 FCC 2d 226 (1976).

[22] In this Order, the Commission stated that it did not contend that it had a sweeping mandate to further the national policy against discrimination nor had it sought to duplicate the detailed regulatory efforts of specialized agencies such as the EEOC. It stated that it sought instead to limit its role to that

the sample EEO program as set forth in the 1975 Notice of Inquiry represented a significant improvement and a substantial clarification of its previous EEO program requirements. It stated that the new information elicited in the model EEO program would significantly aid both broadcast licensees and the Commission in carrying out the goals of eliminating discrimination based on race, color, religion, national origin and sex and implementing meaningful programs of equal employment opportunity.

13. In 1976, the United States Supreme Court held that a general grant of authority to regulate an industry in the public interest does not authorize the regulation of employment discrimination per se and that discriminatory practices may be considered only to the extent that such conduct is directly related to the agency's particular statutory responsibilities. However, the Court noted that FCC regulations concerning discrimination by broadcasters can be justified insofar as they are necessary to enable the Commission to satisfy its obligation under the Communications Act to ensure that licensees' programming fairly reflects the tastes and viewpoints of minority groups.[23] This latter finding is consistent with the Commission's conclusion in 1968 that racial discrimination by licensees raises a question as to whether they are consulting in good faith with minority community leaders concerning programming to serve their areas' needs and interests.[24]

14. In 1978, the Commission adopted a Report and Order which delineated its investigative jurisdiction and methods of cooperation with the EEOC. The Commission stated that it would refer complaints of employment discrimination, if appropriate, to the EEOC and that it would take cognizance of any final determinations reached concerning complaints of employment discrimination against broadcasters filed with government agencies and/or courts established to enforce nondiscrimination laws.[25]

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of assuring on an overall basis that stations are engaging in employment practices that are compatible with their responsibilities in the field of public service programming. Id. at 229-230.

[23] See NAACP v. Federal Power Commission, 425 U.S. 662 (1976).

[24] See 1968 Memorandum Opinion and Order, supra, at 770.

[25] See Memorandum of Understanding Between The Federal Communications Commission and the Equal Employment Opportunity Commission, 70 FCC 2d 2320 (1978).

15. The Commission requires broadcast licensees to establish and maintain an equal employment opportunity program designed to provide equal employment opportunities for minorities and women in all aspects of their employment policies and practices.[26] Broadcast stations with five or more full-time employees are required to file a "Broadcast Equal Employment Opportunity Program Report" (Form 396) as part of their renewal application. This Report requests general information concerning the recruitment and hiring practices of the licensee during the renewal year, i.e., the 12-month period prior to the filing of the renewal application. The information requested includes: examples of recruitment sources contacted to attract minority and female applicants; the number of minority and female referrals received from these sources; and the number of overall and upper-level hires[27] and promotions occurring at a station. Licensees also are required to file a Broadcast Station Annual Employment Report (Form 395-B) on a yearly basis.[28] These reports request data regarding a station's workforce profile for a two-week payroll period, broken down by full or part-time status, job category, gender and race or national origin.

16. Prior to 1987, the Commission's EEO enforcement in the broadcast area focused on whether licensees met our processing guidelines[29] regarding women and minorities overall and in the upper-four job categories as reflected in the last Form 395-B

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[26] See 47 C.F.R. § 73.2080. The EEO compliance of broadcast stations is reviewed once every five years at renewal time for television and once every seven years at renewal time for radio. See 47 C.F.R. § 73.1020(a).

[27] Upper-level hires include hires for the top four of the nine job categories listed on Broadcast Station Annual Employment Reports: Officials and Managers, Professionals, Technicians, and Sales Workers. We note that upper-level hires are the same as upper-four hires.

[28] See 47 C.F.R. § 73.3612.

[29] The processing guidelines are used to analyze a comparison of the composition of the station's employment profile, as reflected in its Annual Employment Reports, with the relevant labor force, and are applied as follows: stations with five to ten full-time employees meet the guidelines if the proportion of minority and female representation on their overall staffs is at least 50% of that of the relevant labor force, and on their upper-level staffs at least 25% of that of the relevant labor force. Stations with 11 or more full-time employees meet the guidelines if the proportion of minority and female representation is at least 50% of that of the relevant labor force for both overall and upper-level job categories.

filed before the license term expired. Licensees meeting the processing guidelines were presumed to be in compliance with the Commission's EEO requirements and, absent Petitions to Deny, their renewal applications were granted unconditionally without further review. Further, the Commission rarely scrutinized a licensee's hires outside the context of the most recent Annual Employment Report. However, in 1987 the Commission adopted a Report and Order that emphasized the use of an efforts-based approach to assessing compliance.[30] As a result, the Commission departed from its reliance on the processing guidelines as the principal means of assessing compliance. Since 1987, all renewal applications have received a more complete review, irrespective of whether stations meet or fail our processing guidelines.

17. Currently, when reviewing a broadcaster's EEO compliance at renewal time, the Commission's primary focus is on the licensee's overall efforts to "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practices."[31] The efforts evaluation is a two-step process. The first step involves an evaluation of a station's efforts based on a full range of information available concerning its EEO record. The staff reviews the composition of the station's workforce as reported in its Annual Employment Reports filed during the license term; the station's EEO program filed as part of the renewal application including the recruitment sources listed, the number of minority and female referrals received, the number of minorities and women hired during the renewal year and the licensee's analysis of the effectiveness of its EEO efforts; any final determinations of complaints filed with government agencies and/or courts established to enforce nondiscrimination laws; and any petitions to deny or informal objections filed against the renewal. If the first step of review indicates that the station's EEO efforts are satisfactory, the station is found to be in compliance with our EEO Rule.

18. However, if the initial analysis indicates that a station's efforts may be less than satisfactory with regard to such areas as minority and/or female recruitment and hiring, it is subject to a second-step analysis. This analysis usually includes a request for additional information. Our request will typically ask for each job filled during the requested period (usually the last three years of the license term): the title and job

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[30] See Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967 (1987)("Broadcast EEO"); see also 4 FCC Rcd 1715 (1989) (NAB Report and Order).

[31] 47 C.F.R. § 73.2080; see Broadcast EEO, supra; see also NAB Report and Order, supra.

classifications (based on classifications set forth in Form 395-B) of the position; the date the position was filled; the number, sex, race or national origin and referral source of applicants and interviewees; whether the job was part-time or full-time; the sex and race or national origin of the successful candidate; the recruitment sources contacted; and the number, race and sex of referrals received from each recruitment source. In addition, we request a list of all full-time employees, showing job title, job classification, sex and race ranked from highest to lowest paid. We review the station's inquiry response as well as relevant pleadings to determine if, among other things, the station notifies sources of minority and female referrals when vacancies occur and engages in continuous self-assessment of its EEO program. If a broadcast station is found to be in compliance with the Commission's EEO Rule, renewal is granted. If, however, it is not in compliance, the Commission may impose a variety of remedies and sanctions, such as admonishment, reporting conditions, renewal for less than a full term and/or forfeiture. Alternatively, if the facts so warrant, the Commission will designate the renewal application for hearing to determine whether renewal of license should be granted or denied.[32]

19. Recently, the Commission issued an EEO Policy Statement,[33] which established non-binding guidelines for assessing forfeitures for violations of the Commission's broadcast EEO Rule. The Policy Statement indicated that the base forfeiture amount for violation of the broadcast EEO Rule is $12,500. It provided guidance on what circumstances generally may lead to such a forfeiture, described upward and downward adjustment criteria and factors warranting a short-term renewal as well as circumstances that may require designation for hearing. In United States Telephone Association v. FCC, 28 F.3d 1232 (D.C. Cir. 1994)("USTA"), the Court set aside our general forfeiture guidelines because they were promulgated without notice and comment rule making. While the Court in USTA did not address our EEO Policy Statement, members of the broadcast community have called for the withdrawal of the Policy Statement and the promulgation of new guidelines pursuant to notice and comment rule making. Since the USTA decision, the Commission has

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[32] See Applications of The Lutheran Church/Missouri Synod For Renewal of Licenses of Stations KFUO/KFUO-FM Clayton, Missouri, 9 FCC Rcd 914 (1994) (Lutheran Church); Applications of Dixie Broadcasting, Inc. For Renewal of Licenses of Stations WHOS(AM)/WDRM(FM) Decatur, Alabama, 7 FCC Rcd 5638 (1992) (Dixie Broadcasting); Application of WXBM, Inc. For Renewal of License of Station WXBM-FM Milton, Florida, 6 FCC Rcd 4782 (1991) (WXBM, Inc.).

[33] 9 FCC Rcd 929 (1994) (Policy Statement)(petitions for reconsideration and requests for clarification pending).

employed a case-by-case or precedential analysis in its EEO decisions. Most recently, this method has been used to decide the following renewal cases: Application of KSBW License, Inc. For Renewal of License For Station KSBW-TV Salinas, California, (FCC 94-239) Adopted September 19, 1994; Applications of WHYW Associates, L.P. For Renewal of License For Station WMYG(FM), (FCC 94-253) Adopted September 30, 1994.

20. In the 1992 Cable Act, Congress adopted provisions requiring that the Commission conduct mid-term reviews of broadcast television station licensees.[34] The legislative history of the 1992 Cable Act indicates that Congress intended the mid-term evaluation of a licensee's employment practices to be based on an analysis of workforce data using our present processing guidelines.[35] Therefore, we amended our rules to include the standard discussed in the Conference Report as the basis for examining employment practices.[36] The mid-term review is conducted by evaluating the first two Annual Employment Reports that are filed after a television station's license has been renewed. A deficiency letter is sent to those licensees that fail to meet the processing guidelines. However, the issuance of a mid-term deficiency letter to a licensee is not viewed as a sanction. Further, a station's compliance at mid-term with the processing guidelines is not evidence of overall EEO compliance efforts at renewal. Nevertheless, "at renewal time, we will take cognizance of all pertinent license term EEO data, including data relied upon for mid-term review."[37]

21. At the present time, we license more than 13,000 radio and television stations. Of that number, approximately two-thirds

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[34] We note that the 1992 Cable Act states that:
[e]xcept as specifically provided in this section, the Commission shall not revise ... the regulations concerning equal employment opportunity as in effect on September 1, 1992 (47 C.F.R. Section 73.2080) as such regulations apply to television broadcast station licensees and permittees; or ... the forms used by such licensees and permittees to report pertinent employment data to the Commission.

47 U.S.C. § 334.

[35] See H.R. Rep. No. 862, 102d Cong., 2d Sess. 97 (1992) reprinted in 1992 U.S.C.C.A.N. 1231, 1279.

[36] Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992 Equal Employment Opportunities, 8 FCC Rcd 5389 (1993)(hereinafter "Cable Report and Order") (petitions for reconsideration pending).

[37] Id. at 5392.

have five or more full-time employees and, therefore, are required to file their EEO programs with their renewal applications. Approximately 80% of these stations' renewals are granted after review of their Annual Employment Reports, EEO programs, complaints and any other pleadings filed concerning the stations' renewals. We send inquiry letters to the remaining 20%. As a result of our review of these stations, we sanction approximately one-fifth of the remaining 20%. Thus, 4% of all stations subject to EEO review receive reporting conditions and/or sanctions. The majority of stations in this 4% category receive reporting conditions and/or forfeiture sanctions. Ultimately, approximately 96% of the renewals reviewed are granted without reporting conditions and/or sanctions.

B. Cable.

22. The Commission began its EEO enforcement in the cable area in 1972 when it adopted a Report and Order[38] which implemented new EEO rules for the cable industry[39], analogous to those already adopted for the broadcast industry.[40] These rules (which applied to cable system operators with five or more employees, in their capacity as operators and also in their capacity as licensees and permittees of community antenna relay stations ("CARS")), required the filing of three documents: EEO Program Statements, Annual Employment Reports and Annual Complaint Reports, listing EEO complaints filed against cable operators or

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[38] See In re Amendment of the Commission's Rules to Require Operators of Community Antenna Television Systems and Community Antenna Relay Station Licensees to Show Nondiscrimination in Their Employment Practices, 34 FCC 2d 186 (1972).

[39] The Commission believed that the same considerations of public policy that apply to broadcast and common carrier facilities, see p. 23, infra, were applicable to cable systems. Accordingly, in 1971, the Commission released a Notice of Proposed Rulemaking to initiate its EEO enforcement of cable systems. See Amendment of the Commission's Rules To Require Operators of Community Antenna Television Systems and Community Antenna Relay Station Licensees To Show Nondiscrimination in Their Employment Practices, 29 FCC 2d 18, 18-19 (1971).

[40] The EEO processes for broadcast stations and cable operators are similar in that, in both cases, the Commission's primary focus is on efforts to recruit, hire and promote qualified minorities and women. However, differences exist in the type of information relied upon in reviewing EEO programs, the frequency with which Commission review occurs and the types of remedies and sanctions which can be imposed in the face of non-compliance.

CARS licensees.

23. Prompted by a study of Annual Employment Reports filed by cable systems in 1974, the Commission subsequently modified its EEO rules in a 1978 Report and Order.[41] The Commission found that minorities and females were disproportionately represented in the lesser skilled and lower paying job categories within the cable industry and that, in general, these groups were not employed in numbers commensurate with their availability.[42] These results suggested that the EEO programs being utilized by cable television operators were not sufficiently active or affirmative. As a result, the Commission emphasized that its EEO rules not only prohibited discrimination in employment,[43] but required cable operators to establish and pursue a positive, continuing program of specific practices to assure equal employment opportunity. At this time, the Commission also decided to update labor force statistics itself rather than relying on individual cable systems to do so. In addition, the Commission combined the Annual Complaint Report with the Annual Employment Report. In remedying cable systems' non-compliance with the EEO rules, the Commission used a variety of measures, including requests for more specific data, use of on-site investigations and, in the case of significantly deficient EEO programs, the establishment of goals and timetables.

24. Six years later, in 1984, the Cable Communications Policy Act of 1984 ("1984 Cable Act")[44] was enacted and, in 1985, the Commission adopted rules to implement the EEO provisions of the Act.[45] Under these rules, cable systems and headquarters units

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[41] See Nondiscrimination in the Employment Policies and Practices of Cable Television Applicants and Certificate Holders and Licensees of Cable Television Relay Stations, 69 FCC 2d 1324 (1978).

[42] Id. at 1325.

[43] Specifically, cable operators may not discriminate against any person in employment because of race, color, religion, national origin or sex.

[44] See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 1 et seq., 98 Stat. 2779 (1984). We note that in this Act Congress included a prohibition against age discrimination along with a prohibition against discrimination against those categories already protected by the Commission's rules, namely, race, color, national origin, religion and sex.

[45] See In re Amendment of Part 76 of the Commission's Rules to Implement the Equal Employment Opportunity Provisions of the Cable Communications Policy Act of 1984, 102 FCC 2d 562

with six or more full-time employees are evaluated on an annual basis pursuant to staff review of the unit's Annual Employment Report (Form 395-A).[46] In addition to the Annual Employment Report, cable systems are required to complete a Supplemental Investigation Sheet (SIS) every five years. The Annual Employment Report is reviewed using a two-step process which involves a statistical analysis of the cable system's workforce and a review of the system's responses to questions regarding its EEO program. With limited exceptions, this analysis is the same as that used for broadcast entities. The only exceptions are that the analysis begins with cable systems with six or more full-time employees, as opposed to five or more full-time employees for broadcasters. In addition, for a cable headquarters unit, the upper-level staff is compared to national, not local, labor force statistics.

25. If a system appears to be in compliance with the EEO rules, it is granted certification for that year. If the system is not engaging in sufficient efforts or is not attracting a diverse pool of applicants, additional inquiries are made. If, based on the Annual Employment Report and responses to subsequent inquiries, it is determined that the system is not in compliance, certification is denied. When certification is denied, the Commission may impose various remedies or sanctions, including an admonition, reporting conditions, a monetary forfeiture, suspension of the CARS license until the violation is corrected, denial of a CARS application, or revocation of a license for a CARS facility. The Commission can also communicate its adverse findings to the local franchising authority.

26. Additionally, the staff conducts selective on-site reviews of cable systems to verify their EEO programs and ensure that employees are properly classified. The Commission encourages cable systems to conduct business with minority and female entrepreneurs.[47]

27. In 1992, Congress enacted the 1992 Cable Act. Congress found

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(1985).

[46] Form 395-A requires, inter alia, that cable systems identify full-time and part-time employees by race and sex in each of the following categories: officials and managers; professionals; technicians; salespersons; office and clerical personnel; skilled craftpersons; semi-skilled operatives; unskilled laborers; and service workers. In addition, Form 395-A requires the inclusion of the number of minorities and females in the relevant labor market for each of the specified job categories.

[47] See 47 C.F.R. § 76.75(e).

that minorities and females were not employed in significant numbers in managerial positions in the broadcast and cable television industries, and that increased numbers of minorities and females in managerial positions will advance the nation's policy favoring diversity in the expression of views in the electronic media. As a result, Congress adopted new EEO provisions within the 1992 Cable Act, which require that the Commission collect more specific employment data from cable entities, including specific information on the job titles of employees. In addition, the Act increased the current nine cable job categories to 15[48] and expanded the scope of the cable EEO provisions to include multichannel video programming distributors ("MVPDs").[49] The Commission also developed a new Form 395-M to cover MVPDs.[50] This form is similar to the Form 395-A. In July 1993, the Commission released a Report and Order to implement the EEO provisions of the 1992 Cable Act.[51]

28. There are approximately 2,300 cable employment units. Of those units, approximately 95% receive EEO certifications based upon our review of their Annual Employment Reports and any other available information. Further, all units receive an SIS once every five years. Each year, based upon our review of their Annual Employment Reports, SIS responses and any other available information, approximately 90% of these units receive certifications. Typically, the staff schedules audits of 25 cable companies a year and decertifies half of the units audited. Since the 1984 Act, the Commission has sanctioned two cable operators based upon information obtained during on-site

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[48] The six job categories added by the 1992 Cable Act include Corporate Officers, General Manager, Chief Technician, Comptroller, General Sales Manager and Production Manager.

[49] The 1992 Cable Act defines an MVPD as "a person, such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(12).

[50] In order to facilitate the transitional filing period for MVPDs, the Commission waived the filing of 12-month hiring and promotion data as requested in Section V (subsections B and C) and Section VII of the 1994 Annual Employment Report.

[51] See Cable Report and Order, supra.

reviews.[52]

29. Currently, there is little information available on the effects of the EEO provisions of the 1992 Cable Act on equal employment opportunity in the cable industry. The revised Cable Television Annual Employment Report and the new MVPD Annual Employment Report (Form 395-M) were due to be filed at the Commission May 31, 1994. At this time, the majority of the forms have not been evaluated.

C. Common Carrier

30. The FCC first adopted EEO requirements for common carrier entities in 1970.[53] In extending EEO regulation to common carriers, the FCC opined that the same considerations leading to its conclusion that discriminatory employment practices by a broadcast licensee are incompatible with the licensee's operation in the public interest apply, as well, to a common carrier licensee. In the Report and Order adopting the new regulations, the Commission also noted that telephone or telegraph common carriers occupy "a privileged status" as a result of their monopoly position in their particular geographic areas, which requires the public to do business with them. The Commission concluded "[t]his unique public interest role makes it particularly important that [common carriers] not engage in discriminatory employment practices."[54]

31. Like broadcasters, common carrier licensees are required both to develop and implement an EEO program and to file annual employment reports with the FCC. Common carrier licensees with sixteen or more employees are required to file EEO programs. The necessary elements of such common carrier EEO programs are similar to those described above for broadcast licensees. Once a program is on file, licensees must file any changes or amendments to the program no later than April 1 of each year after the initial filing. Unlike broadcast licensees, a common carrier licensee is neither required to evaluate its employment profile and job turnover against the availability of minorities and women in its recruitment area, nor to ensure some level of parity between its employment profile and the employment of minorities and females in the geographic area. There is no model EEO program (FCC Form 396) for common carriers.

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[52] Adelphia Communications Corporation's Unit 305, Palm Beach County, Florida, 9 FCC Rcd 908 (1994) (Adelphia Cable); Prime Cable, 4 FCC Rcd 1696 (1989).

[53] See Employment Practices by Common Carriers, 24 FCC 2d 725 (1970).

[54] Id. at 726.

32. Each common carrier licensee must file an annual employment report on FCC Form 395 on or before May 31 of each year. [55] Licensees with fewer than 16 employees need merely certify that such is the case and execute the form. All other licensees must provide complete employment data. The annual employment report form for common carrier licensees is similar to FCC Form 395-B for broadcast licensees. The only significant difference is that the form for common carrier licensees has a section that calls for information relating to on-the-job training programs in addition to the sections requesting data on full-time and part-time employees.

33. Section 21.307(d)(1) of the Commission's Rules, 47 C.F.R. § 21.307(d)(1), requires each licensee to submit an annual report on or before May 31 each year listing any complaints filed against the licensee which allege violations of federal, state, territorial or local law in any competent jurisdiction. The FCC Form 395 has been revised recently to incorporate this annual complaint reporting requirement.

34. We have summarized the origins and history of our EEO rules as well as detailed our current procedures for enforcing those rules. The following section provides statistics describing the increased employment of women and minorities in the broadcasting and cable industries from 1986 to 1993, and compares it to the increased employment of women and minorities in the overall national workforce during the same period.

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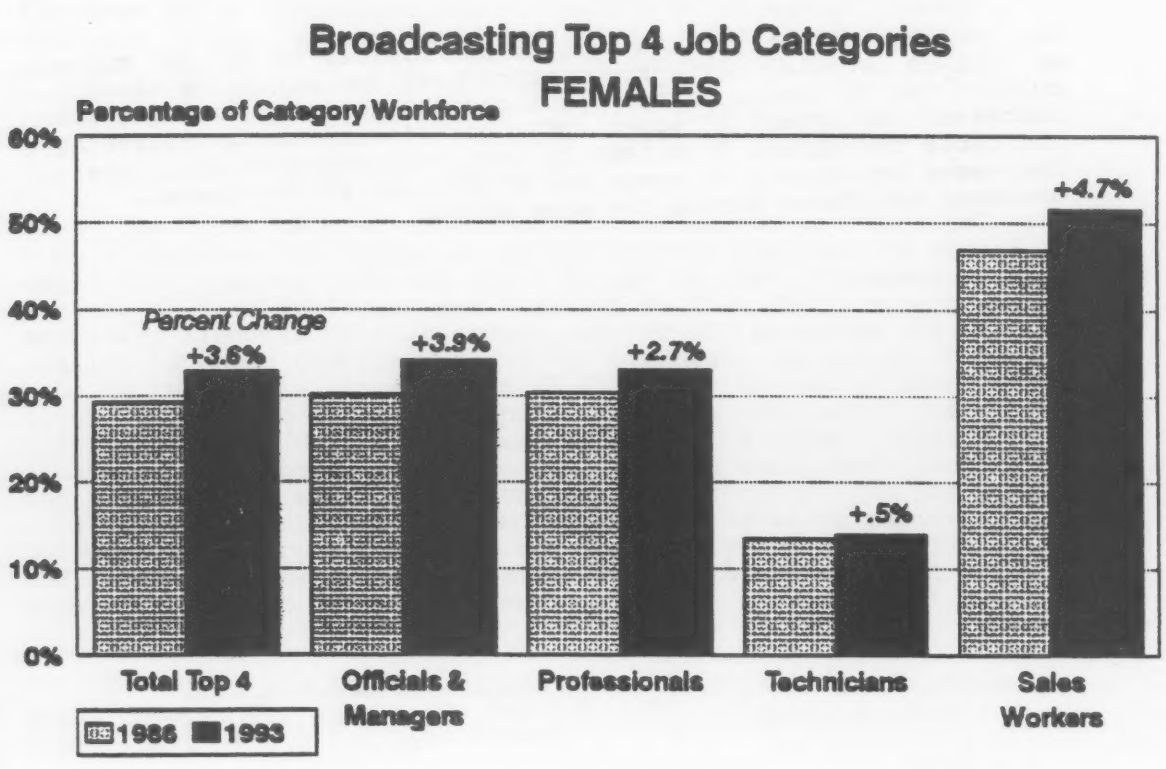
[55] See 47 C.F.R. § 1.815(a).

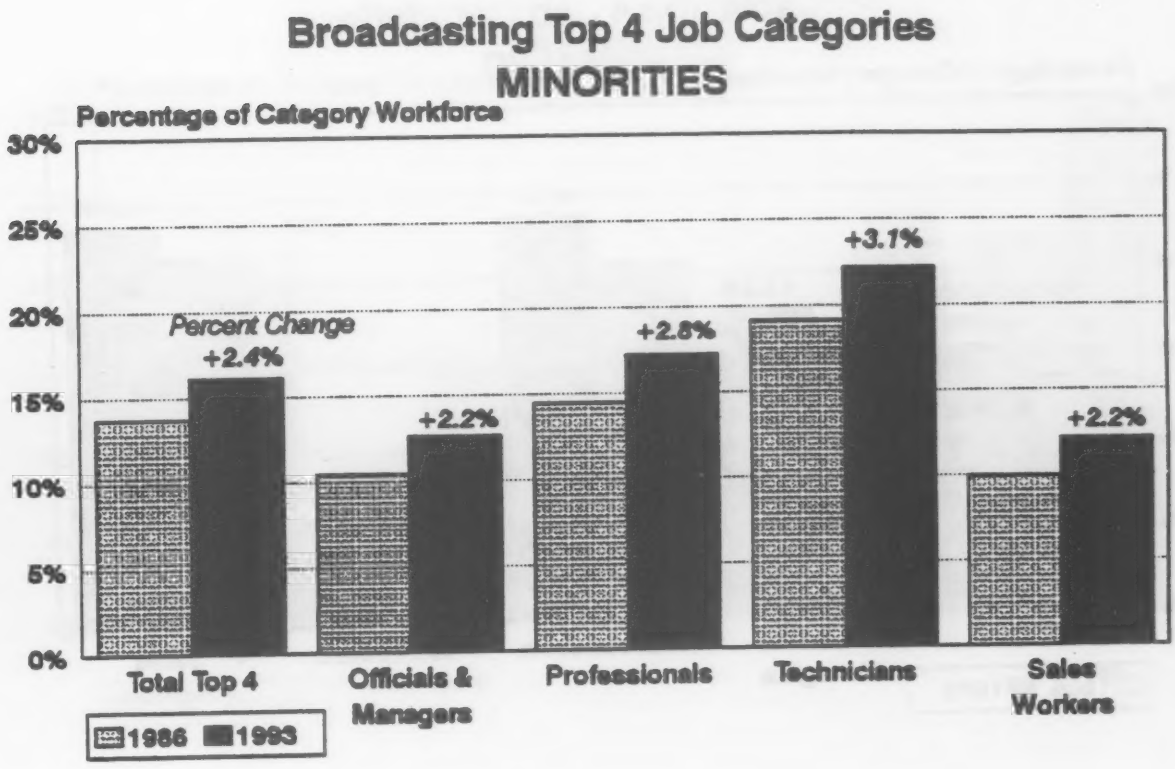
IV. EMPLOYMENT LEVELS OF WOMEN AND MINORITIES

A. Broadcast

35. Women. From 1986 to 1993, women in the overall national workforce increased from 44.5% to 45.6%, a net gain of 1.1%. In contrast, from 1986 to 1993, women in the broadcast industry overall increased from 37.4% to 39.6%, a net increase of 2.2%. See Appendix C. During this same time period, women in the broadcast industry in total upper-level positions increased from 29.2% to 32.8%, a net increase of 3.6%. In the four individual upper-level job categories, women increased: from 30.1% to 34.0% for Officials and Managers, a net gain of 3.9%; from 30.3% to 33.0% for Professionals, a net gain of 2.7%; from 13.4% to 13.9% for Technicians, a net gain of .5%; and from 46.9% to 51.6% for Sales Workers, a net gain of 4.7%. See chart below.

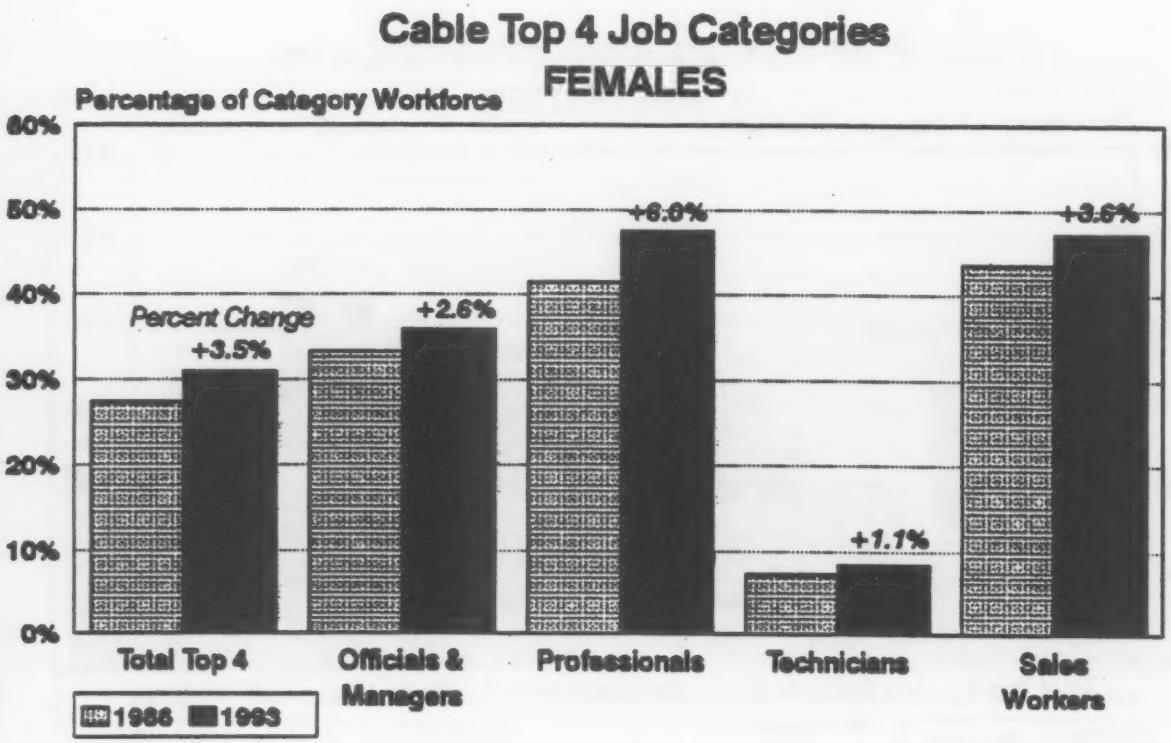


36. Minorities. From 1986 to 1993, minorities in the overall national workforce increased from 20.5% to 22.6%, a net gain of 2.1%. During this same time period, minorities in the broadcast industry overall increased from 16.0% to 18.2%, a net increase of 2.2%. See Appendix C. From 1986 to 1993, minorities in the broadcast industry in total upper-level positions increased from 13.7% to 16.1%, a net increase of 2.4%. In the four individual upper-level job categories, minorities increased: from 10.4% to 12.6% for Officials and Managers, a net gain of 2.2%; from 14.4% to 17.2% for Professionals, a net gain of 2.8%; from 19.1% to 22.2% for Technicians, a net gain of 3.1%; and from 9.9% to 12.1% for Sales Workers, a net gain of 2.2%. See chart below.

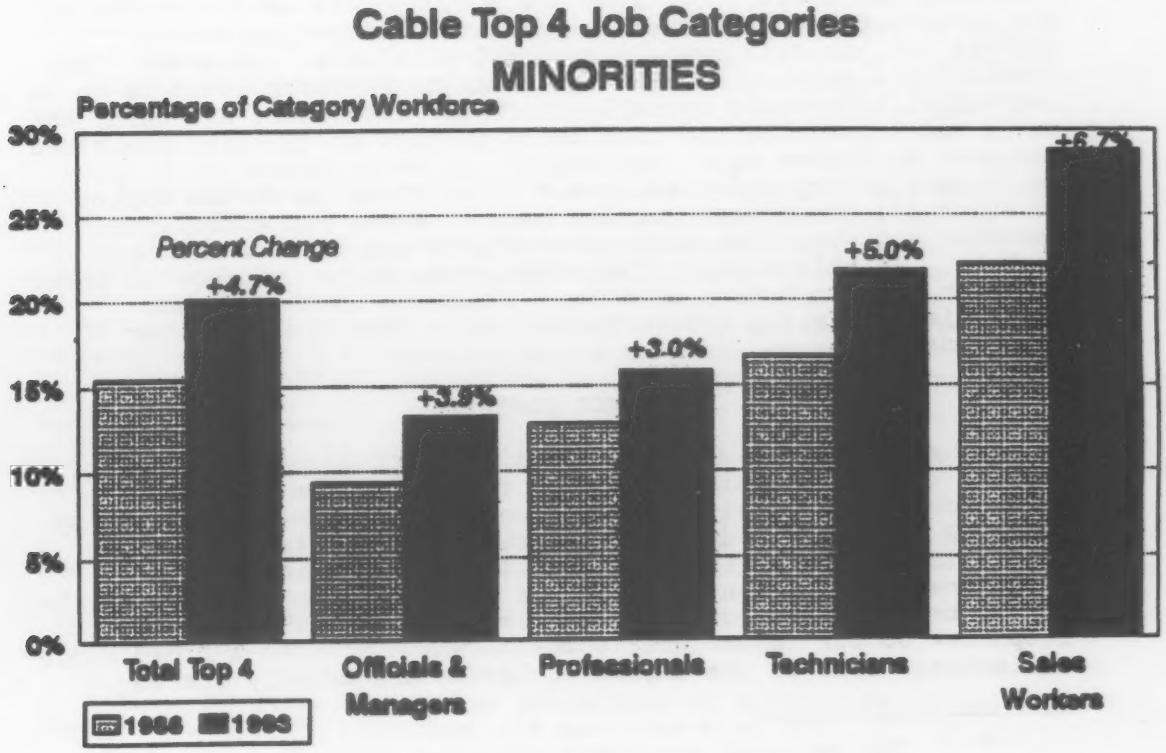


B. Cable

37. Women. From 1986 to 1993, women in the cable industry overall increased from 40.4% to 41.6%, a net increase of 1.2%. See Appendix D. During this same time period, women in the cable industry in total upper-level positions increased from 27.4% to 30.9%, a net increase of 3.5%. In the four individual upper-level job categories, women increased: from 33.3% to 35.9% for Officials and Managers, a net gain of 2.6%; from 41.5% to 47.5% for Professionals, a net gain of 6.0%; from 7.3% to 8.4% for Technicians, a net gain of 1.1%; and from 43.6% to 47.2% for Sales Workers, a net gain of 3.6%. See chart below.



38. Minorities. From 1986 to 1993, minorities in the cable industry overall increased from 18.5% to 25.3%, a net increase of 6.8%. See Appendix D. During this same time period, minorities in the cable industry in total upper-level positions increased from 15.4% to 20.1%, a net increase of 4.7%. In the four individual upper-level job categories, minorities increased: from 9.3% to 13.2% for Officials and Managers, a net gain of 3.9%; from 12.8% to 15.8% for Professionals, a net gain of 3.0%; from 16.7% to 21.7% for Technicians, a net gain of 5.0%; and from 22.1% to 28.8% for Sales Workers, a net gain of 6.7%. See chart below.



C. Analysis

39. Paragraphs 35 through 38 reflect that the employment of women and minorities in the broadcast and cable industries increased from 1986 to 1993 in overall and total upper-level positions, as well as in each of the upper-level job categories. In fact, the data show that most of these increases outpaced the 1.1% growth in women employees and the 2.1% growth in minority employees overall in the "national workforce."[56] Overall increases in minority and female employment in the broadcast industry occurred despite a significant decrease in overall employment from 1986 to 1993. See Appendix B.

40. The above-cited results demonstrate the apparent success of our EEO policies in increasing minority and female employment in the broadcast and cable industries. Despite the gains made between 1986 and 1993, the 1993 percentages of women in the broadcast and cable industries overall, as well as minorities in the broadcast industry overall, are still below comparable figures for the 1993 overall national workforce. Moreover, the Commission's primary focus in determining EEO compliance is on an individual licensee's overall effort to "establish, maintain, and carry out a positive and continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practices."[57] Our focus is on the extent to which licensees seek out and recruit women and minorities whenever job vacancies exist at stations and systems in local markets. In this regard, there continues to be evidence in cases in which the Commission sanctions licensees that women and minorities are still not recruited for a significant number of positions.[58]

V. NOI COMMENTS

41. As stated above, in March 1994, the FCC issued a Notice of Inquiry ("NOI") in which we sought comment on the effect and operation of the equal employment opportunity amendments made by the 1992 Cable Act and on the general effectiveness of the Commission's rules, procedures, policies, standards and guidelines in promoting equality of employment opportunity in the cable, broadcast and other industries. We received a variety of responses to our request for comments which covered a broad range of issues. Some of the important issues are briefly stated

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[56] The national workforce includes individuals aged 16 years and older, both employed and unemployed.

[57] 47 C.F.R. Section 73.2080.

[58] See para. 79, infra.

below. The issue areas have been divided into broadcast concerns, cable concerns and emerging technology concerns. In summary, the key broadcast concerns focused on: small market/small staff stations; part-time hires; joint recruitment efforts; administrative burdens imposed by our EEO enforcement; renewal applications; annual employment reports; mid-term reviews; processing guidelines; FCC's EEO Policy Statement; and penalties. In cable, the comments focused on other agency requirements; labor force definition; notice; and annual employment reports. With regard to emerging technologies, the comments generally focused on the pros and cons of the FCC expanding the coverage of its EEO rules to other communications industries.

A. Broadcast

42. Small Market[59]/Small Staff Stations. Some broadcast commenters contend that although they contact a variety of sources, including minority sources, they receive few, if any, minority referrals. Reasons cited for their difficulties included issues such as: low salaries and availability of mostly entry level positions; competition with communications companies in larger markets and/or with larger staffs and other local employers; and limited financial, personnel, and time resources available for recruiting.

43. Commenters put forth suggestions for changes in EEO policies to reflect problems faced by small market broadcasters and/or small staff stations. Some of the suggestions include establishing thresholds of population,[60] staff size[61] and/or percentage levels of minorities in the labor force[62] below which recordkeeping of sources and referrals would not be required or required only if a station failed to meet the processing guidelines.[63] Several commenters request that the FCC focus on a

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[59] We note that there is no definition for small market stations in our EEO rules.

[60] Suggestions for population figures include 100,000 in the station's county and 500,000 in the station's market.

[61] Suggestions for staff size range from less than 15 employees to less than or equal to 40 employees.

[62] Suggestions for the percentage of minorities in the population include less than 10% and less than 20%.

[63] In addition, some commenters argue that noncommercial educational stations should be exempted from EEO recordkeeping and reporting requirements. Joint Commenters, see Appendix A, argue that public institutions should not be exempt.

small market station's qualitative recruitment efforts because it may not be realistically able to meet the FCC's numerical goals.

44. Some commenters urge the FCC to incorporate certain factors in its analysis of a small station's EEO program, including amount of turnover of staff, customarily lower salaries, station format, station market ranking, and reduced opportunities for advancement. Another commenter recommends that the FCC credit small market stations for part-time employees.

45. Joint Commenters[64] urge the FCC to identify and exclude all race neutral factors such as market size, station size, format and pay, as defenses for noncompliance.

46. Part-time. Many commenters state that the requirement for documentation of part-time hires should be eliminated. Some commenters propose that the FCC consider, if submitted by the licensee, a record of part-time minority employment in mitigation of minor deficiencies in its full-time employment profile.

47. Some commenters advocate continuing the requirement for part-time efforts documentation. The National Hispanic Media Coalition (NHMC) also urges the Commission to apply processing guidelines to part-time employees because more and more licensees choose to downsize and economize by hiring part-time employees. The National Association of Broadcasters (NAB) argues that such a suggestion is largely unworkable because part-time hires are generally filled on a short-term basis or with very little notice and, therefore, it would be counterproductive and a disincentive to hiring part-time employees.

48. Joint Commenters approve of a licensee's using part-time hires to mitigate its EEO record only if the fact that a licensee fails to hire even part-time minority employees operates in favor of designation for hearing. Joint Commenters also propose that thorough documentation of the legitimacy of part-time employees should be required.

49. Joint Recruitment Efforts. Many commenters agree that joint recruitment efforts, where groups of broadcasters or broadcast associations seek out women and minority applicants, should be encouraged. NAB recommends giving broadcasters more credit for using joint recruitment efforts and giving credit for job fairs, unsolicited resumes and participation in seminars such as those conducted by the NAB's Department of Human Resource Development and Employment Clearinghouse. Other commenters propose that, if a licensee obtains minority and/or female referrals from a state

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[64] See Appendix A, Number 39.

broadcast association or through other cooperative efforts, such contact should equal individual contact with minority and/or female sources. The Texas Association of Broadcasters suggests that it would be helpful if the FCC could identify on an ongoing basis the national organizations actually able to refer minority applicants. It also proposes that the FCC encourage "referrals of minorities by stations in states and cities with large minority populations to similar markets in other states where there are fewer minorities in the general populace."

50. Joint Commenters cite two dangers if the FCC allows licensees unlimited use of joint recruitment efforts. First, they worry that licensees may claim that the failure of joint efforts to produce results immunizes them from EEO scrutiny. Second, they are concerned that such a practice would prevent individual licensees from developing name recognition and reputation in the community as equal opportunity employers. They suggest that participation in joint recruitment efforts should be encouraged to supplement but not substitute for local recruitment sources.

51. Administrative Burdens. Many commenters express the view that administrative burdens on broadcasters should be reduced and present several options for accomplishing this task. One suggestion is that the FCC should coordinate its EEO enforcement determinations and reporting forms with various other federal and state agencies dealing with EEO matters. Another commenter suggests alleviating paperwork if a station's hiring record meets the processing guidelines. If a station's hiring record failed to meet the guidelines, then the commenter suggests that the licensee should be allowed to document efforts and explain its failure. NHMC proposes that the FCC require licensees to list only the minority recruitment sources that produced minority referrals in their Form 396. Several commenters express concern that administrative burdens are particularly difficult for small staff and/or market stations. Joint Commenters argue that all of the administrative burdens imposed on licensees are so slight as to be meaningless.

52. Renewal Applications. The Commission sought comment on the following proposed changes to Form 396. Noting the hiring and recruiting data requested in Form 396, the Commission queried whether the form should be revised to request more detailed information for the renewal year similar to data requested in an inquiry letter. Noting that the form does not ask that broadcasters distinguish between full-time and part-time hires in their responses, the Commission queried if the renewal application should be revised either to request information only for full-time hires or to request that the information be divided by full-time and part-time hires. In addition, it asked if it should monitor efforts by broadcasters to promote part-time employees to full-time positions.

53. The Commission received a variety of responses to the proposed changes. Many commenters are against requiring additional information on Form 396. Conversely, NHMC states that the FCC should require a summary of recruiting, hiring and promotion efforts for the whole license term. Joint Commenters argue that the Form 396 should be revised to include a breakdown of the race and sex of all applicants referred by particular sources, hires and promotions; require proof that affirmative recruitment efforts were undertaken for each job vacancy; and elicit the kind of contact made with recruitment sources. They also propose that Form 396 as well as Form 395 be revised to require reports from local combinations of three or four co-owned stations. NAB opposes Joint Commenters proposal and asserts that the FCC should simplify and clarify its procedures.

54. Regarding full and part-time hires, some commenters argue that Form 396 should request information only concerning full-time hires but that licensees should have the option of submitting information on part-time hires as a means of getting extra credit for minority and female recruiting and promoting efforts that produce part-time applicants, hires and promotions. Another commenter states that the FCC should continue to include part-time hires if it will give credit for part-time hires in assessing compliance.

55. Annual Employment Reports. The Commission invited comment in the NOI on whether the Broadcast Station Annual Employment Reports should be revised to require that employment information be collected for the same 15 job categories as is now required for cable operators and MVPDs pursuant to the 1992 Cable Act. The Commission also asked what the costs and benefits of the above-cited revisions would be. Some commenters reject the notion of expanding the job categories in the Form 395-B. One commenter states that it does not wish to encourage more time spent on already heavy government applied workloads yet believes that all communications companies ought to operate under the same rules, including supplying the same EEO information. Joint Commenters approve the idea of expansion but argue that the six new categories should be different from those used for cable and should include Corporate Officers, General Manager, General Sales Manager, Senior Producer, Chief Technician, and Comptroller. It also asserts that the Broadcast Annual Employment Report should request information regarding promotions broken down by race and part-time/full-time status. Several commenters propose that the FCC require broadcasters to submit a narrative statement with their Form 395 that details their EEO efforts and the results of those efforts.

56. Mid-term Review. Joint Commenters criticize the FCC's present method of analyzing a television station's EEO record at mid-term. They assert that Congress intended for the FCC to review at mid-term employment practices which, according to

§ 73.2080(b) of the Commission's Rules, 47 C.F.R. § 73.2080(b), include recruitment efforts, promotions, procedures, numbers of hires and promotions as well as efforts undertaken to implement the licensee's EEO program. Joint Commenters propose that forfeitures be assessed at mid-term, that the results of a mid-term review be taken into account at renewal time and that the Commission extend mid-term review to radio.

57. Processing Guidelines. Several commenters propose that the present processing guidelines of 50% parity with the labor force be increased. Joint Commenters urge that the processing guidelines be increased to 100% of parity.[65] NHMC proposes that the processing guidelines be increased to 60% of parity on January 1, 1995, 70% of parity in 1996 and 80% of parity in 1997. NAB argues that raising parity benchmarks at this time is unwarranted but, if the FCC decides to do so, the NAB recommends that it be done gradually and prospectively, applicable beginning with the licensee's next renewal cycle.

58. EEO Policy Statement. In response to the NOI, the Commission received many comments regarding the EEO Policy Statement, supra. The issues discussed in the comments were, for the most part, duplicative of comments made by parties in their petitions for reconsideration to the Policy Statement. Many of the commenters who responded to the Policy Statement and NOI stated that the matters raised in the Policy Statement should be considered in a full notice and comment proceeding. In addition, some commenters requested that the FCC clarify parts of the Policy Statement including: the meaning of the term, "adequate pool"; statistical benchmarks; and the extent to which the EEO emphasis now is on efforts or on a specific percentage of women and minorities that must be in each applicant pool.

59. Penalties. Several commenters discuss present and potential penalties to impose on broadcasters. Some commenters express their approval of a "Three Strikes and You're Out" proposal. Under this proposal, a licensee would receive a warning and reporting conditions for a first EEO violation, a fine and a short term renewal for the second violation and a large fine or designation for hearing for a third EEO violation. One commenter recommends that the warning also include suggestions for improving a licensee's EEO program. Joint Commenters oppose the "Three Strikes" proposal.

60. One commenter suggests creating a system of special recognition for stations which have employed innovative approaches for recruitment. It also urges the FCC not to

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[65] Joint Commenters also suggest that the FCC increase the processing guidelines for cable operators and other entities covered by our EEO rules to 100% of parity.

sanction the buyer of a station for EEO violations by the seller of a station. NAB states that it supports this request. Joint Commenters argue that the FCC needs to impose forfeitures more frequently.

B. Cable

61. In the NOI, the Commission sought comment regarding the Commission's cable EEO rules, policies and enforcement. Comments submitted on these topics by cable operators, private citizens, and citizens groups indicate that there are a number of areas of public concern.

62. Other Agencies/Labor Force. Time Warner Cable suggests that cable systems or companies performing government contracts in excess of $50,000 should be required to comply only with the FCC's EEO rules and not with Executive Order 11246[66] (administered by the Office of Federal Contract Compliance Program). It also states that there should be a more realistic formulation of the applicable labor force than the MSA and urges the Commission to utilize data from the municipalities served by the cable unit instead of the MSA.

63. Notice. The Commission sought comment on what ways it could better enable cable operators and MVPDs to meet their EEO goals in light of changes to the cable EEO rules based on the 1992 Cable Act. Inasmuch as the 1992 Cable Act expanded the scope of EEO enforcement to the MVPDs, the Commission specifically sought suggestions as to how we might better inform cable operators, MVPDs and the public about the EEO requirements.

64. Bell Atlantic, whose programming affiliate is an MVPD, states that the FCC's present reporting system will have little meaning when applied to many other multi-channel programmers. It urges the FCC to be flexible in applying its rules to take into account the differences between MVPDs and cable operators.

65. Joint Commenters assert that the FCC should require video dialtone providers and other MVPDs to obtain written acknowledgment of their EEO obligations from each provider that uses their common carrier facilities, that a copy of that acknowledgment should go to the FCC and that this action will enable the FCC to compile a list of program providers. Joint Commenters state that the FCC has granted some programming privileges to the telephone industry and argues that, to the extent that such programming is marketed directly to the consumers, the FCC should require local exchange carriers (LECs) to comply with EEO provisions of Cable Act. They recommend that the FCC issue a clarifying statement providing examples of kinds

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[66] 41 C.F.R. §·60-1.7.

of programming in which LEC's are permitted to have an ownership interest.

66. Annual Employment Report. Pursuant to the 1992 Cable Act, the Commission modified Form 395-A to require cable operators to provide the gender, race and national origin of each employee falling into one of the nine original and six new job categories. The Commission sought suggestions on any additional information which should be collected. Cable Television Human Resources Association suggests that, with the advent of restructuring and consolidation in the cable industry, job titles such as district manager, general manager and system manager are disappearing from company organization charts. It argues that the Commission should redefine the general manager subcategory to include Vice-President of Operations/Customer Service, Vice-President of Corporate Affairs and Programming, Vice-President of Management Information Services and others.

67. Joint Commenters argue that the Form 395-A and-M should be revised to more accurately evaluate an operator's EEO efforts. They suggest that the second question in Section III be revised to ask how many and what kinds of organizations the cable operator has contacted when job vacancies occur. Joint Commenters argue that the SIS should involve a more thorough investigation of supporting documentation. They recommend that the unit be required to file documentation in such areas as: reliance on minority and other referral agencies as part of the recruitment effort; and evaluation of employee profile and job turnover against the availability of women and minorities in the labor market.

C. Emerging Technologies

68. NOI. Finally, in the NOI, the Commission noted that there are a significant number of emerging technologies in the field of communications as well as a convergence of existing communication technologies. The Commission asked if our EEO policies should be expanded with respect to entities other than broadcasters, cable operators and MVPDs. For example, it asked if the EEO policies should be expanded to include common carrier technologies, particularly those that provide services that compete with broadcast and cable services (other than MVPDs already covered by the 1992 Cable Act).

69. Expanding Coverage. Some commenters argue that the Commission should not increase its coverage of its EEO rules. U.S. West Communications, Inc. (U.S. West) argues that EEO policies should not be expanded to include LEC video dialtone providers. U.S. West adds that if and when LECs provide video programming in the future, they would become subject to the Act's EEO requirements. Joint Commenters argue that video dialtone providers are covered under our present rules. In addition,

Joint Commenters argue that the FCC should affirm that common carriers that have obtained a judicially granted right to provide cable television service are subject to Section 634 of the Cable Act, 47 U.S.C. § 554.

70. Ameritech Operating Companies, which owns telephone companies in five states, argues that the determinative factor in deciding whether or not the FCC should extend its cable and broadcast industry EEO/Affirmative Action (AA) regulations should not be the similarity of current or potential technologies but whether the employer in question is already regulated for EEO/AA purposes.

71. A group of 32 commenters individually filed identical comments in which they request that the EEO rules be extended to Regional Bell Operating Companies (RBOCs) when legislation is passed allowing RBOCs and cable companies cross ownership privileges. They urge the FCC to require all common carriers and smaller companies to be required to fill out Form 395-A, to scrutinize these reports and to act accordingly.

72. Joint Commenters believe that the EEO provisions of the Communications Act should apply to all carriers regulated by Title II of the Communications Act, that are now required only to adopt an EEO program and submit an Annual Employment Report. They assert, considering the convergence of technology that is taking place, that the same EEO requirements should apply to all competitors. They argue that the basis for FCC EEO jurisdiction of these entities is the nexus between content based services and technologies and that, with essential services such as newspapers and books being increasingly accessed by means of sophisticated digitized multi-media technology, common carriers are no longer content neutral. They argue that the policies of diversity once reserved for content based services must be applied to services that will control access to information in digitized format because by controlling this access, these services significantly determine whether broad and diverse segments of society will receive advanced communications services. Joint Commenters maintain that revised EEO oversight in the common carrier field will greatly advance the goal of minority and female representation in upper-management. U.S. West rejects Joint Commenters' arguments.

73. Bell Atlantic states that it would not oppose extending broadcast and cable EEO rules to common carriers if the FCC determines that there is some public interest reason for doing so. It urges that any action by the FCC must eliminate redundancies with other agencies; harmonize differences in our own sets of rules; take into account the different structure of common carriers; and apply equally to all providers, including interexchange carriers, and competitive access providers, in addition to local exchange carriers, cable operators and

broadcasters.

74. The FCC has not had sufficient time to develop fully its positions with regard to these issues. Accordingly, the Commission believes that more time should be devoted to the analysis of these issues in order to more completely examine the effect of any proposed changes.

VI. OBSERVATIONS

75. Congress required that the Commission review and obtain public comment on the effect and operation of amendments regarding EEO that were contained in the 1992 Cable Act. In addition, Congress directed the Commission to further consider the effectiveness of its other EEO procedures, regulations and policies, especially with respect to the Congressional policy favoring increased employment opportunity for women and minorities in management positions.

76. Our review reveals that our present policies have been and are effective in promoting equal employment opportunities in the broadcast and cable industries. However, more progress can and should be achieved. Accordingly, we should attempt to further improve our policies in these areas. Our review also indicates that, as demonstrated below, it is imperative that we undertake a broad analysis of our EEO policies to ensure effective EEO enforcement in all communication areas in the future.

77. To improve and refine the current EEO policies and procedures, the FCC has further demonstrated its commitment to EEO by establishing a new Office of Communications Business Opportunities (OCBO), which has as part of its mission the coordination and oversight of EEO practices adopted by the FCC. In addition to OCBO's role of supporting the creation and expansion of small, minority and women-owned communications businesses, OCBO will be responsible for coordinating Commission-wide EEO enforcement activities; making policy recommendations to the Commission regarding EEO matters; coordinating with other government agencies which have EEO responsibilities; organizing seminars and conferences on EEO issues; conducting research on EEO issues; promoting employment opportunities for minorities and women within the communications industry; and conducting long range planning activities in the area of EEO. A new Director, Anthony Williams, and Deputy Director, Catherine J. Kissée-Sandoval, with experience in these matters and with existing relationships with minority and female groups, have recently been appointed to head OCBO. They and their staff are currently developing an administrative structure to better assist the Commission in the review of EEO issues, many of which are highlighted in this report.

A. Current Policies In Broadcasting and Cable

78. As noted above, the results of our review of the Commission's EEO policies reveal that the Commission's EEO efforts-based policy has been effective in ensuring the compliance of the broadcast and cable industries with our EEO rules. Further, the policy has been effective in increasing the employment of minorities and women in overall and upper-level positions, and individual upper-level job categories. As noted supra, minorities and women in the broadcast and cable industries in the referenced categories increased from 1986 to 1993. In almost every category, particularly in the upper-level categories, the increase outpaced the 1.1% growth of women and the 2.1% growth of minorities in the overall national workforce.[67] In the broadcast Officials and Managers category, women and minorities increased by 3.9% and 2.2%, respectively. In the cable Officials and Managers category, women and minorities increased by 2.6% and 3.9%, respectively. Overall increases in minority and female employment in the broadcast industry occurred despite a significant decrease in overall employment from 1986 to 1993. In addition, we note that approximately 96% of the broadcast renewal applications reviewed are granted without reporting conditions and/or sanctions, and that over 90% of cable units are certified each year. In light of the above, it would appear that our policies have been effective insofar as these statistics provide an indication of overall industry progress.

79. Despite the gains achieved between 1986 and 1993, percentages of women and minorities in the broadcast industry in 1993, as well as women in the cable industry, remained below the comparable figures for the 1993 overall national workforce. Moreover, the Commission's primary focus in determining EEO compliance is on an individual licensee's overall effort to "establish, maintain, and carry out a positive and continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practices."[68] Thus, our focus is on the extent to which licensees seek out and recruit women and minorities whenever job vacancies exist at stations and systems in local markets. In this regard, there continues to be evidence in cases in which the Commission sanctions licensees that women and minorities are still not recruited for a significant number of positions. In fact, despite our requirements, in many of these cases, for which we have issued sanctions, positions were filled without any

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[67] This growth may be attributable to a dearth of minority and female employees in the past.

[68] 47 C.F.R. Section 73.2080.

recruitment having taken place.[69] Given the foregoing, we believe that a continuing need exists for EEO enforcement in the communications industry.

B. NOI Comments

80. Broadcast. We believe that a legitimate concern was raised by commenters, who argue that market and/or staff size prevents stations from attracting and retaining minority employees. Thus, we may consider such factors as population and staff size as well as the percentage of minorities in the labor force, as appropriate areas to examine more fully in the future. In particular, we will want to explore how such changes can bring needed relief consistent with a viable EEO program.

81. The decision of whether or not to include part-time hires in our analysis may be an important issue which needs further study because the total number of employees, whether full-time or part-time, may play an important role in assessing an entity's overall employment profile.

82. We agree with commenters who argue that in many instances, the use of joint recruitment efforts should be encouraged, particularly where such recruitment may provide a comprehensive method of attracting qualified minorities and females. In the future, we will explore the extent and type of such activities and how the Commission can play a more positive role in encouraging such activities.

83. Regarding relief from administrative burdens, we believe

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[69] Applications of KTEM Radio, Inc. For Renewal of Licenses of Stations KTEM/KPLE(FM), Temple, Texas, 9 FCC Rcd 836 (1994) (failed to recruit for 23 of 35 positions); Applications of Dennis Elam, Trustee For Bakcor Broadcasting, Inc., Debtor, For Renewal of Licenses of Stations KMND/KNFM(FM) Midland, Texas, 9 FCC Rcd 879 (1994) (failed to recruit for 19 of 29 positions); Applications of Pinnacle Communications, Inc. For Renewal of Licenses of Stations KTMS/KHTY-FM, Santa Barbara, California, 9 FCC Rcd 894 (1994) (failed to recruit for 37 of 56 positions); Applications of Buckley Broadcasting Corporation For Renewal of Licenses of Stations WSEN(AM)/WSEN-FM, Baldwinsville, New York, 9 FCC Rcd 2099 (1994) (failed to recruit for 18 of 27 positions); Applications of Historic Hudson Valley Radio, Inc. For Renewal of Licenses of WGHO(AM)/WBPM(FM), Kingston, New York, 9 FCC Rcd 2132 (1994) (failed to recruit for 23 of 35 positions); Applications of Midland Broadcasters, Inc. For Renewal of Licenses of Stations WIBW(AM)/WIBW-FM, Topeka, Kansas, 9 FCC Rcd 2091 (1994) (failed to recruit for 15 of 22 positions); Lutheran Church, supra (failed to recruit for 21 of 35 positions) (designated for hearing).

that the technological advances will lend themselves to a more "on-line approach" to our various filing requirements. However, we note that further investigation of this area is warranted in order to fully comprehend the extent of such administrative burdens and to shed light on some of the more innovative ways that the Commission can streamline its filing requirements.

84. Regarding proposed changes to renewal applications (Form 396) and annual employment reports (Form 395-B), we believe that further investigation of this topic is warranted.[70]

85. We find that requests that we use a different method of analyzing a television station's EEO record at mid-term warrant thorough review in order to allow us to make an appropriate assessment of our current method. As such, we also believe that a more in-depth analysis of our EEO requirements in this regard, is warranted given the large number of comments received relating to it and the ramifications of the USTA decision discussed at paragraph 19, supra.

86. Cable. We find that the suggestion to use labor force data from municipalities served by a cable unit instead of data from the unit's MSA when analyzing the employment records of cable entities may be reasonable in some instances. However, we believe it is necessary to study this issue further in order to examine the effects of such an analysis using labor force data from municipalities and to develop uniform guidelines We also believe that an enhanced review of how we might improve notification of cable operators, MVPDs and the public concerning various EEO requirements is appropriate. In addition, because annual employment reports serve as our primary tool for monitoring EEO compliance, we perceive the need to re-examine the effectiveness of our forms and to determine if we need to revise them accordingly.

87. We direct the staff to determine and recommend to us the appropriate procedural vehicle for addressing all of the matters discussed in paragraphs 80 through 86, supra.

C. Long-Term EEO Monitoring of the Overall Telecommunications Industry

88. Our review of our current EEO policies and comments received in response to the NOI, as well as our awareness of the ongoing communications revolution, require us to institute a more extensive and far-reaching review of our equal employment opportunities policies for the future. Our aim is to adapt those policies, which provide a solid base upon which to build, to the telecommunications marketplace and workplace of the Twenty-First

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[70] See supra n.34.

Century. We irect the staff to determine and recommend the best methods for addressing the issues discussed below.

89. The telecommunications arena in the Twenty-First Century will be remarkably different from that of the late 1960's, when we began EEO enforcement, and even from that which exists today. In the late 1960's, communications technologies that were widely available to the public included mainly radio, television, and telephone services. Today, we have an integrated information highway, comprising a network of communications technologies that includes: telephone services that reach 93.9% of American homes;[71] cable systems that pass more than 90% of American homes; broadcast television and radio stations that reach virtually 100% of Americans; a cellular telephone system that covers most of the country; and satellite video distribution services.

90. Moreover, we are on the brink of a huge and dramatic shift in our telecommunications infrastructure.[72] In the next decade, the technological convergence of our communications delivery systems will profoundly change our modes of communication, the communications marketplace, and the telecommunications workplace. The current information and communications delivery systems are on the verge of converting to digital technology. In communicating via digitized means, voice, video, and data services merge so that satellites may provide cable television or mobile telephone service, telephone systems may deliver cable television services and coaxial cable can be used to provide telephone services. In traditional mass media areas like broadcasting, new ways of using the spectrum are being developed. New hybrid services are also emerging that will deliver programming as well as data and voice services.

91. As we move into the twenty-first century, we must adapt our EEO policies so that the goals of EEO will continue to be met in the context of what we expect to be a vastly different telecommunications system. Although our EEO policies now apply to multichannel video programming distributors, thus covering some new technologies, the current EEO enforcement and regulatory structure otherwise focuses mainly on broadcasters and cable

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[71] Alexander Belinfante, "Telephone Subscribership in the United States," Industry Analysis Division, Common Carrier Bureau, FCC, August 1994, p.6.

[72] For an overview of the future of telecommunications, see Gary M. Epstein, "The Future of Telecommunications," Practicing Law Institute, 377 Telecommunications Policy and Regulation 127 (1993).

system operators.[73] A fundamental question is whether we should expand the focus of our EEO policies to include new and emerging communications technologies and industries.

92. Expansion of our EEO policies may be warranted in order to achieve regulatory parity and fairness in the enforcement of the Commission's EEO rules. Such parity may be justified given the convergence of telecommunications technologies, which increasingly will subordinate the importance of the means of delivery of telecommunications services to the actual technologies and services provided to the public. Further, in light of technological convergence, imposing separate and unique EEO requirements on different telecommunications services may no longer be warranted.

93. Broadening our EEO policies could further the national goal of promoting participation by women and minorities in the design and deployment of advanced telecommunications services and technologies and fostering nationwide access at reasonable rates to these advanced telecommunications technologies.[74] The expansion of our EEO rules and policies could foster this objective since it will help ensure that minority and female viewpoints are represented within telecommunications entities when planning decisions are made as to how and when consumers will have access to the new technologies and services.[75]

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[73] As stated previously, the FCC applies general equal employment opportunity guidelines to common carrier licensees and permittees and has adopted annual reporting requirements, but does not impose equivalent EEO requirements to those imposed on broadcasters and cable operators. See p. 23, supra.

[74] For example, Congress directed the Commission to promote economic opportunity for businesses owned by minorities and women in legislation enabling the Commission to conduct competitive bidding for new spectrum-based services, including common carrier services. See 47 U.S.C. § 309(j)(4)(C).

[75] We note that, in finding that the national policy against discrimination is applicable to common carriers and proposing to adopt common carrier EEO rules, the Commission noted that such carriers must provide nondiscriminatory service and that "a company which follows discriminatory employment practices would find it difficult to provide nondiscriminatory service. Both because of the special position granted communications common carriers by the government, and the relationship between service to the public and the carriers' employment practices, it would be intolerable to countenance discriminatory employment practices." Notice of Proposed Rulemaking, Docket No. 18742, 34 Fed. Reg. 19,200, 19,201 (Dec. 4, 1969).

94. Further, the President's Council of Economic Advisors has projected growth in employment in the telecommunications and information sector from 3.6 million workers in 1993 to more than 4.5 million workers in 2003.[76] To the extent that this expansion results from the growth of new telecommunications services, it reinforces the need to reexamine our EEO policies to ensure that women and minorities are full participants in the overall telecommunications sector, especially in management positions, which are often stepping stones to ownership.

95. As we deal with issues arising from technological convergence and the communications revolution, we intend to analyze whether we should redesign and redirect our EEO policies to reflect the communications revolution and bring those policies into the Twenty-First Century. We intend to enter into a dialogue with public interest groups, consumer groups, trade associations, think tanks, civil rights groups, labor groups, academics, other government agencies, and the communications industry. We expect that the OCBO will play a primary role in this review and analysis.

96. To the extent lack of training is a factor, we may wish to encourage and give credit for internships and training programs as a means of encouraging minority and female entry into employment in communications. We hope that the analysis we initiate can serve as a stimulus for industry-wide meetings among telecommunications entities and trade associations to combine their efforts to develop and maintain such industry-wide or company-specific internship and training programs for minorities and females. Such entities and associations are in the best position to determine the kinds of skills needed to enter and advance in employment in their industries.

97. Moreover, we will inform our review and analysis with current population and workforce data, as well as projections about the future. We will obtain statistical and economic data from a wide variety of sources, including governmental agencies, such as the Departments of Labor and Commerce, and the Census Bureau, as a base on which to build the new regulatory EEO structure.

98. As we consider the extent of this agency's EEO authority with respect to new and emerging technologies, we must consider certain fundamental issues. First, we must examine our statutory authority in this area and determine whether additional authority is required. Second, we must study whether the policy justifications that provide the underpinnings for our broadcast

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[76] Executive Office of the President, Council of Economic Advisors, Economic Benefits of the Adminstration's Legislative Proposal For Telecommunications, June 14, 1994, p.9.

and cable EEO regulations also apply to these new technologies. We expect to solicit views and data in response to the following questions, among others, before we begin the process of transforming our EEO regulatory structure:

1. What are the projected changes in the composition of the workforce and in the nature of the workplace? Do these changes have any implications for our future EEO policies? What measures are necessary to ensure that any new EEO rules adopted reflect the changing workforce?

2. What changes in the economy are projected, and what are the implications of these changes for our EEO regulatory structure?

3. In an increasingly white collar, highly technical telecommunications field, what measures might be taken to ensure that the workforce pool of minorities and women is more representative?

4. Should we broaden our EEO policies to include all telecommunications entities that transmit programming services, including common carriers? What would the legal and policy basis be for such an expansion?

5. If we broaden EEO enforcement, should the new regulatory scheme be uniform or should it reflect any structural or other differences in the various telecommunications entities and services? For example, should we retain our uniform job categories or define our job categories differently, depending on the communications service at issue, to reflect differences in the types of jobs found in those services?

6. Should we broaden our EEO policies to address new concerns, such as glass ceilings in telecommunications management, and, if so, how could we adopt regulatory structures to do so?

7. How can we tailor any new policies so as to advance our goals without being unduly intrusive or burdensome on growing industries?

8. Can we employ new technologies to streamline our EEO reporting requirements and minimize any burdens imposed?

9. Should we develop new structures to coordinate with other governmental agencies responsible for EEO enforcement, such as the Department of Labor and the Equal Employment Opportunity Commission?

VII. CONCLUSION

99. In conclusion, review of the Commission's EEO enforcement policies and rules shows that they have been and are successful in promoting equal employment opportunities in the broadcast and cable industries. However, our review also indicates that a continuing need exists for EEO enforcement in the communications industry. In addition, as a result of our review, we intend to take appropriate steps in the near future to improve our existing policies in broadcasting and cable, while at the same time initiating a broad analysis with respect to how our EEO policies might be designed in the long-term to apply to all communications industries.

VIII. ORDERING CLAUSE

100. IT IS ORDERED that the Secretary shall send copies of this Report to the appropriate committees and subcommittees of the United States House of Representatives and the United States Senate.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A
LIST OF COMMENTERS

Comments

1. American Women in Radio and Television
2. Ameritech Operating Companies
3. Barnstable Broadcasting, Inc.
4. Bell Atlantic
5. Betap Broadcasting, Inc.
6. Bresson-Hafler Media Group
7. Bulmer Communications of Findlay, Inc., Bulmer Communications of Logansport, Inc., and Bulmer Communications of Ashtubula, Inc.
8. CBS, Inc.
9. Cable Television Human Resources Association
10. Charles River Broadcasting
11. Curators of University of Missouri
12. DWS, Inc.
13. Dow, Lohnes, and Albertson
14. Earshot Broadcasting, Inc.
15. Emmis Broadcasting Corporation
16. Employees of Regional Bell Operating Companies[77]
17. Fairfield Communications, Inc.
18. First Greenville Corporation
19. Foundation for Minority Interests in Media
20. Gateway Communications, Inc.
21. Gilbert Group, Inc.
22. Goetz Broadcasting Corporation
23. Grants Pass Broadcasting
24. Greater Media, Inc.
25. Group M Communications, Inc.
26. Guyann Corporation
27. Ham Broadcasting Company, Inc.
28. Marvin Hill
29. Hopkins County Broadcasting Corporation
30. Houston Christian Broadcasters, Inc.
31. Joint Comments of 23 Named State Broadcast Associations
32. K/A Korp Communications
33. KPAN Broadcasters
34. KTEM Radio, Inc. and Walker County Commons, Inc.
35. Mark Kiester
36. La Paz Broadcasting, Inc.
37. Lake Cities Broadcasting
38. Alan Lang
39. League of United Latin American Citizens, Minority Media and Telecommunications Council, National Association For the Advancement of Colored People, National Bar Association and The Office of Communications of The United Church of Christ (Joint Commenters)

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[77] Thirty-two employees of Regional Bell Operating Companies filing individual comments with identical text.

40. Licensees of One Hundred Broadcast Stations[78]
41. William McElveen
42. Marantha, Inc.
43. Middle Georgia Broadcasting, Inc.
44. Midwest Radio Corporation
45. Mountain Lake Public Broadcasting
46. National Association of Broadcasters
47. National Hispanic Media Coalition
48. Nebraska Rural Radio Association
49. Ocean Drive Communications, Inc.
50. Quantum Broadcasting Corporation
51. Radio Chattanooga, Inc.
52. C. Davis Rankin
53. Russ Oasis
54. Ruston Broadcasting Company, Inc.
55. Raymond Saadi
56. South Carolina Broadcasters Association
57. Gwenn Spikes
58. Rick Staeb
59. Cyril Statt
60. Marvin Strauzer
61. Sunburst II, Inc., Louisiana Media Interests, Inc., and My Country, Inc.
62. William Taylor
63. Texas Association of Broadcasters
64. Lawrence Tighe, Jr.
65. Time Warner Cable
66. Tom S. Whitehead, Inc.
67. Tribune Broadcasting Company
68. Tri-Cities Radio Corporation
69. Twin Cities Broadcasting Corporation
70. United Cerebral Palsy Association
71. U.S. West Communications, Inc.
72. WHTG, Inc.
73. WRNO Worldwide
74. Waller Broadcasting, Inc.
75. Darnell Washington
76. World Radio Network

Reply Comments

1. Ameritech Telecasting, Inc.
2. League of United Latin American Citizens, et al.
3. National Association of Broadcasters
4. National Public Radio
5. New City Communications, Inc.
6. Press Broadcasting Company, Inc.
7. U.S. West Communications, Inc.

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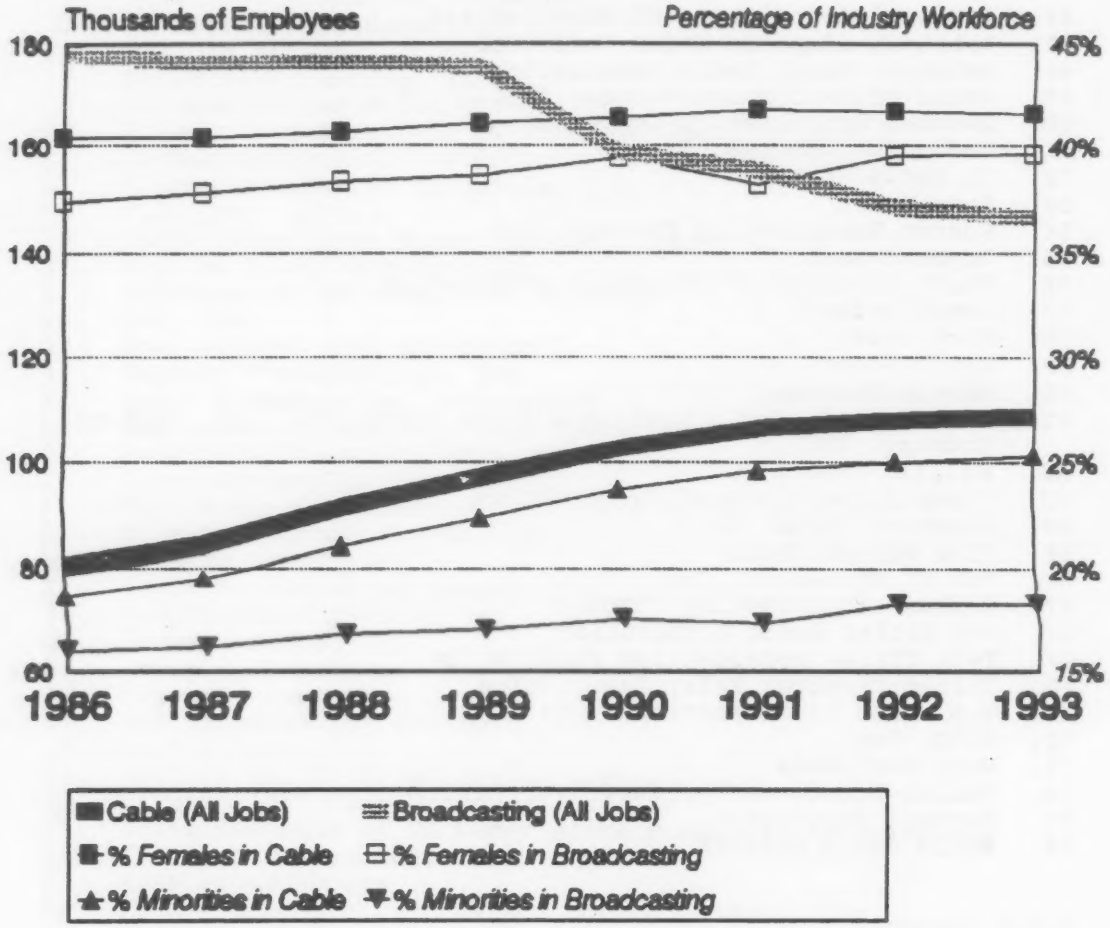
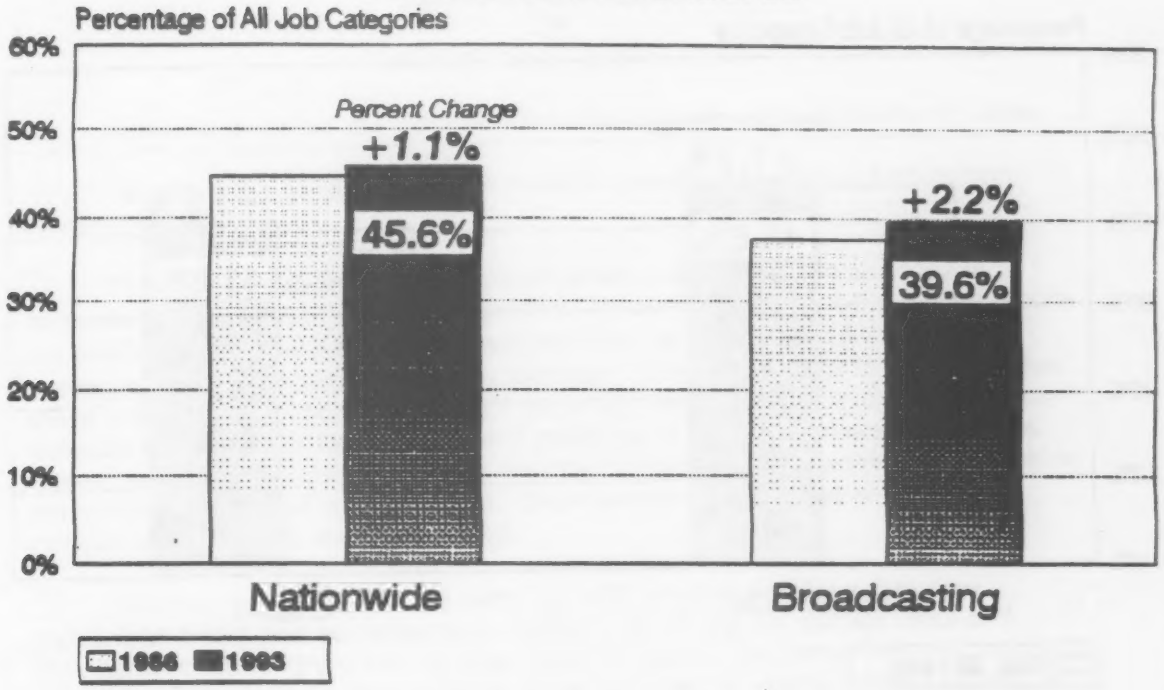
[78] Originally entitled Comments of Licensees of 98 Broadcast Stations but subsequent filing added two more stations to pleading.

Industry Employment
1986 - 1993

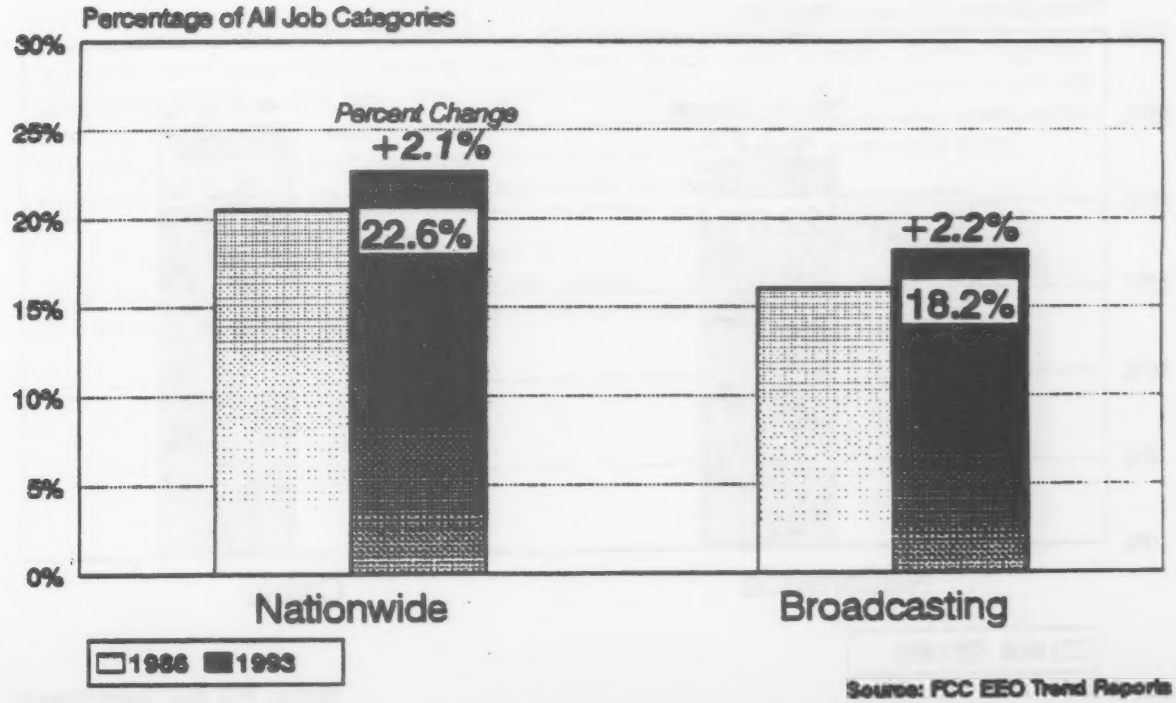


Source: FCC EEO Trend Reports

Females in Workforce

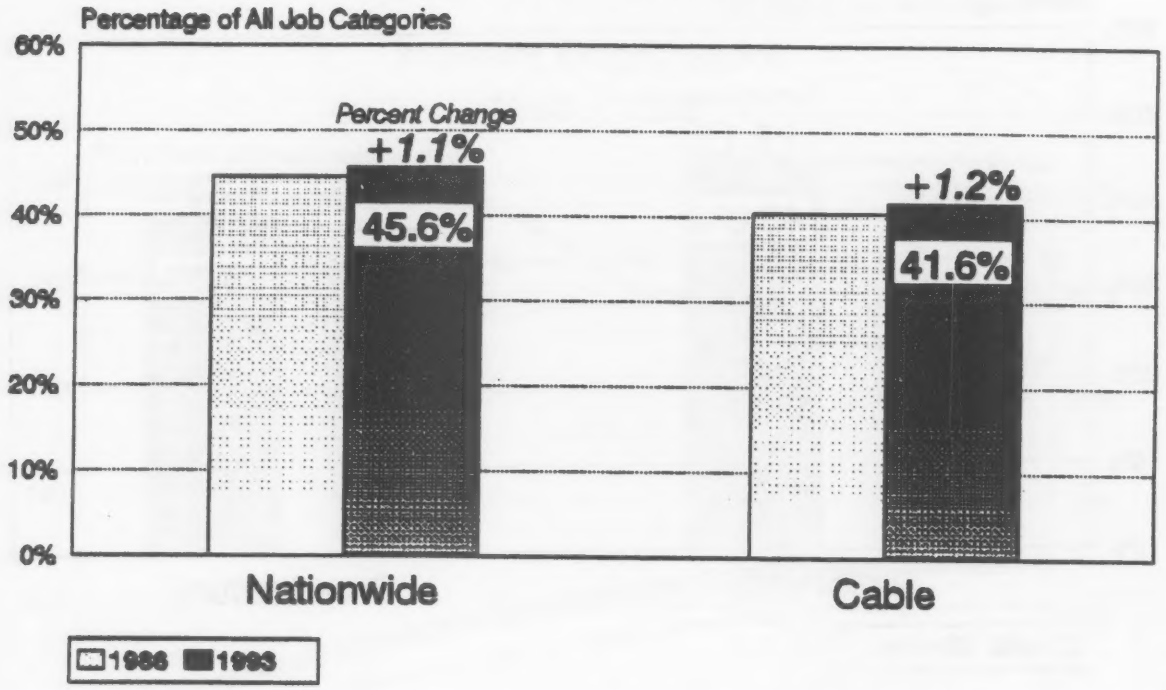


Minorities in Workforce

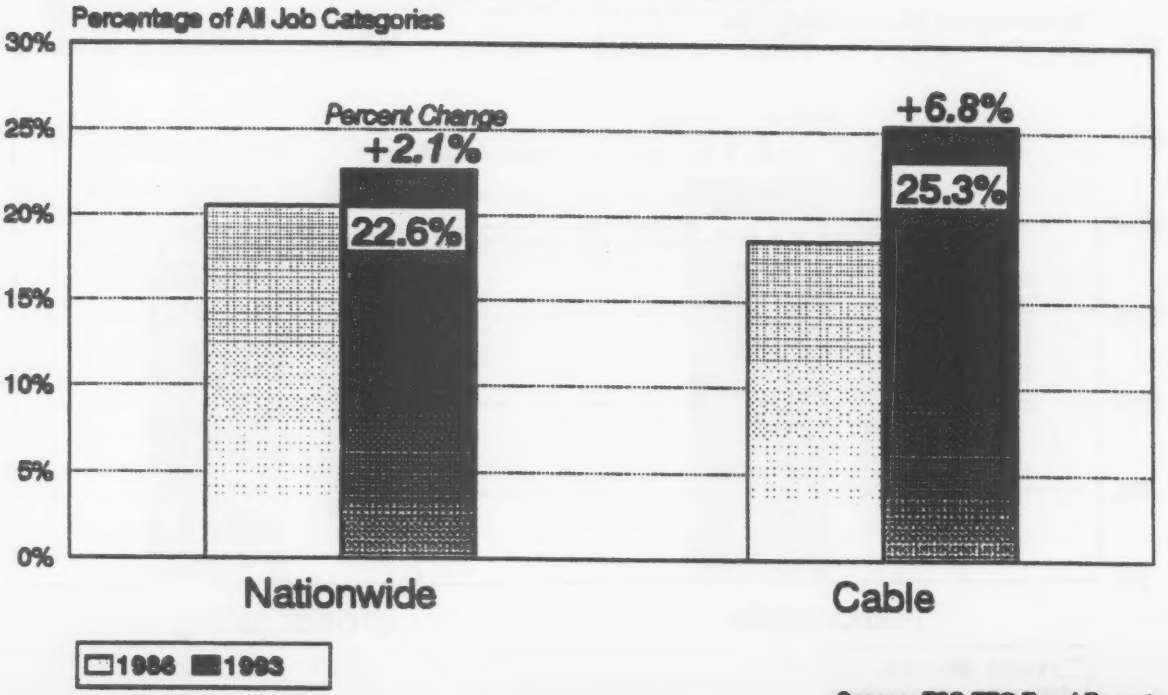


Source: FCC EEO Trend Reports

Females in Workforce



Minorities in Workforce



Source: FCC EEO Trend Reports

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: *Implementation of the Commission's Equal Employment Opportunity Rules*

I support the need for a comprehensive review of our Equal Employment Opportunity policies.

The modest advances in broadcast employment that have been made by minorities and women deserve recognition. However, I find that the overall results are inadequate, particularly in top positions such as group manager, general manager, station manager, and sales manager. One of my goals is to ensure that there are meaningful opportunities for minorities and women not only to be hired, but also to rise to the top management positions at communications companies. These promotional opportunities are essential to provide experience and to position minorities and women for ownership. Experienced management is a critical component to attract media financing.

We must work together to come up with creative solutions that spur meaningful hiring and advancement. While I will review our current rules and enforcement efforts from this vantage point, I also am concerned that our current enforcement techniques may at times place too great an administrative burden on stations and cable systems in smaller markets. Therefore I also will be looking for ways to streamline the process to the extent feasible, consistent with improving employment opportunities.

I am heartened by the efforts to go beyond individual station activities to advance new ways of increasing minority and female employment. Some regional and state broadcasters have held highly successful job fairs and maintain active job banks. While such cooperative efforts do not relieve the obligation that rests with the individual licensees to use their best efforts, I am hopeful that more such innovative ideas will be considered and implemented.

I am delighted by the formation of the new Office of Communications Business Opportunities to address these issues. I look forward to working with it, the industry, and the public to achieve these goals.

FCC 94-266

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
Review of the Prime Time	)	MM Docket No. 94-123
Access Rule, Section 73.658(k) of the	)	
Commission's Rules	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: October 20, 1994 ; Released: October 25, 1994

Comment Date: January 6, 1995
Reply Comment Date: February 6, 1995

By the Commission: Commissioner Barrett issuing a separate statement.

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I. Introduction

1. We initiate this rulemaking proceeding to assess, in light of current economic and technological conditions, the legal and policy justifications for the Prime Time Access Rule ("PTAR"), 47 C.F.R. §73.658(k), and to consider the continued need for the rule in its current form. PTAR was promulgated in 1970 in response to the concern that the three major television networks -- ABC, CBS and NBC -- dominated the program production market, controlled much of the video fare presented to the public, and inhibited the development of competing program sources. The Commission believed that PTAR would increase the level of competition in the independent production of programs, reduce the networks' control over their affiliates' programming decisions, and increase the diversity of programs available to the public. The rule generally prohibits network-affiliated television stations in the top 50 television markets ("Top 50 Market Affiliates") from broadcasting more than three hours of network or former network ("off-network") programs during the four prime time viewing hours (*i.e.*, 7 to 11 p.m. Eastern and Pacific times; 6 to 10 p.m. Central and Mountain times).[1]

2. As the video marketplace has developed and the major television networks' power has declined, PTAR has come under increasing criticism. A number of formal requests for Commission action have been filed challenging the rule in whole or in part. On April 12, 1994, we issued a *Public Notice* soliciting public comment on the following filings: (1) a Petition for Declaratory Ruling (MMB File No. 900418A) filed by First Media Corporation ("First Media")[2] seeking a ruling that the Commission will no longer enforce PTAR because the entire rule can no longer be reconciled with the First Amendment; (2) an Application for

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[1] Section 73.658(k) of the Commission's Rules, 47 C.F.R. §73.658(k), provides, in pertinent part, that commercial television stations owned by or affiliated with a national television network in the 50 largest television markets shall devote, during the four hours of prime time, no more than three hours to the presentation of programs from a national network, programs formerly on a national network (off-network programs) other than feature films, or, on Saturdays, feature films. PTAR contains exemptions for certain types of programming (*e.g.*, runovers of live sporting events, special news, documentary and children's programming, and certain sports and network programming of a special nature) which are not counted toward the three hours of network programming. 47 C.F.R. § 73.658(k)(1)-(6). *See* discussion at ¶¶ 56-57, *infra*.

[2] First Media, L.P., which filed comments in response to the April 12, 1994 *Public Notice*, is the successor-in-interest to First Media Corporation, which filed the Petition for Declaratory Ruling. As used herein, "First Media" refers to both parties.

Review (MMB File No. 870622A) filed by Channel 41, Inc. ("Channel 41")[3] challenging the "off-network" restrictions of PTAR and claiming that, under an analysis of the marketplace, the off-network restriction is no longer warranted; and (3) a Petition for Rule Making (MMB File No. 920117A) filed by Hubbard Broadcasting, Inc. ("Hubbard") raising both marketplace and constitutional challenges to the off-network restrictions of PTAR. Those parties filing comments in response to the *Public Notice* are set forth in Appendix A.

3. Inherent in our regulatory mandate is the continuing responsibility to review our rules and policies to determine whether, in light of prevailing market conditions, such rules and policies continue to serve the public interest. Based on the record already before us and the substantial changes that have occurred in the intervening 20 years since the rule was adopted and will likely occur in the near term in the video marketplace, we are convinced that an overall review of the need for the rule is now appropriate. Parties filing comments thus far, however, have failed to present a rigorous economic framework for analysis, supported by adequate data, that will enable us to assess the competitive effects of the rule and its efficacy in achieving both competition and non-competition-based public interest goals. Accordingly, this *Notice* proposes a framework to evaluate the continued efficacy of the rule. We particularly seek economic and other data and analysis that would assist our analysis within the framework we outline below. Parties who favor retention of all or part of the rule should also comment on whether the more incidental aspects of the rule, such as the specific exemptions to the rule, should be modified and in what manner.

II. Structure of the Industry

4. Critical to assessing whether PTAR has achieved its goals and whether the rule is necessary in today's television marketplace is an understanding of how the market for the purchase and sale of programs operates. Television stations obtain programming for delivery to their viewers in a variety of ways. First, stations that affiliate with a television network obtain an entire package or schedule of programming directly from their network (the network "feed"). The network, in this regard, acts as a broker between the program supplier and its affiliated stations. Each of the three major networks (ABC, CBS, and NBC) distributes its programs to over two hundred television stations nationwide that are connected with the network by cable or satellite. For clearing their airtime for network programming, the affiliates are compensated according to the time of the day they clear time for network programming and the size of their potential audience.

5. The networking of programs intended for the early evening hours that are the

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[3] Channel 41's Application for Review addresses the staff's May 22, 1987 decision denying Channel 41's Petition for Rulemaking to delete the off-network restriction of PTAR. In order to address the matters raised in Channel 41's original petition, as well as the matters raised by Hubbard and First Media, we will consolidate the Application for Review and the rulemaking petitions into this proceeding.

"prime time" for adult television viewing gives advertisers access to a substantial number of American households simultaneously. This, in turn, enables the networks to charge high prices for advertising time that are necessary to defray the cost of obtaining the programming most desired by television viewers. Networks encourage their affiliates to carry the entire network "feed" so as to maximize the national audience they can sell to advertisers.

6. Network affiliates also program part of the broadcast day independently of their network. They air locally originated programming, primarily local news and sports programming. They also obtain programming from suppliers called "syndicators," entities that sell programming to television stations on an individual basis. *Wheel of Fortune* is an example of a program supplied by a syndicator, in this case King World. Having no fixed set of affiliated stations, syndicators traditionally distributed their programming by sending film or tapes of their programs to each television station, a relatively expensive form of program distribution. The advent of satellite technology, however, has made it possible for them to distribute their programming simultaneously to their television station customers, just as the networks provide programming to their affiliates.

7. Stations that do not affiliate with a network are called "independent" stations. There are over 450 independent stations nationwide.[4] The owner of an independent station is responsible for obtaining programming for the entire broadcast day on a program-by-program basis from a number of sources (including, in some cases, a network). While independent stations air some locally originated programming, most of their programming is obtained from program producers or syndicators. Programs such as movies that have been previously shown in theaters, television series that were previously aired on network affiliates (*i.e.*, off-network programs like *The Cosby Show*), and series that have been produced originally for the independent stations (*i.e.*, first-run syndication like *Star Trek: The Next Generation*) make up the bulk of an independent station's program schedule. The independent station owner usually pays the syndicator directly for the programming and then earns revenue by selling the advertising time for such programming. Some syndicated programming, however, is sold on a "barter" basis, by which the television station pays a reduced amount of money (sometimes none) for the programming, but instead allows the syndicator to sell some of the program's advertising time directly to advertisers. Barter allows independent stations to acquire programming with smaller cash outlays. It also allows sale of national advertising on independent stations. Lastly, it allows a cash-strapped independent producer/syndicator to obtain funding from national advertisers directly.

8. Programs aired on broadcast television are produced by program production companies. The major broadcast television networks historically have produced a small

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[4] Over 150 of these stations are now affiliated with the Fox Broadcasting Company, which is considered an "emerging network" under Commission rules. *See* 47 C.F.R. §73.662(g).

number of programs through their in-house production companies.[5] Unlike those networks, however, Fox Broadcasting Company ("Fox") produces a large amount of programming; it is affiliated with a major movie studio, 20th Century Fox. Most television programs that are produced for the networks or independent stations are produced by either the major movie studios (*e.g.*, Fox, Time Warner, Sony, Disney), other independent program producers who often affiliate with a movie studio in order to produce the program, or syndicators (*e.g.*, King World). Programs intended for network distribution are supplied directly to the networks for airing on their affiliated stations. Programs intended for viewing on a non-network or syndicated basis are sold through the syndication "arm" of a production company, or the production company will sell the "syndication" rights to an independent syndicator who is then responsible for negotiating with the individual stations.

9. PTAR affects the programming activities of the participants in the television marketplace in several ways. PTAR explicitly limits the programming choices of network affiliates in the top 50 markets for a portion of their prime time schedule to non-network material. Consequently, it affects the programming they provide their viewers and their advertising revenues associated with this programming. These PTAR limits thus also create a demand for syndicated first-run programming by affiliates of the three major broadcast networks in the top 50 markets. By precluding network affiliates from showing network programs in the access period, PTAR also effectively creates a supply of popular off-network programming (typically "reruns") for purchase by independent stations; these programs typically generate high revenues for those stations. Finally, affiliates of evolving networks such as Fox will not be subject to PTAR until their networks pass certain thresholds. *See* 47 C.F.R. § 73.662 (defining television network subject to PTAR as an entity that provides more than 15 hours of prime time programming per week on a regular basis to at least 75 percent of television households nationwide). Thus, new networks that fall short of this threshold are free to sell programming to all stations, both network affiliates and independents. New network affiliates likewise are free to air all programming regardless of its source -- the major and evolving networks or syndication.

10. The "structure" of the television broadcast industry, in terms of the types of entities that comprise it (program producers, networks, affiliates, independent stations, etc.) and the customer-supplier relationships among them has not changed appreciably in the last quarter century. However, the number of participants in many of these categories and the competitive environment in which broadcast television operates -- the broader video marketplace -- have changed dramatically. It is this change and its impact on the effectiveness and continued advisability of PTAR that are at the heart of our inquiry. We turn

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[5] Under a consent decree, ABC, CBS and NBC were until 1990 prohibited from producing, through a wholly owned program production company, more than a very limited number of prime time programs. That prohibition lapsed in 1991, and since 1993, when corresponding limitations in the FCC rules were repealed, the networks have been free to produce an unlimited amount of programs themselves. *See Second Report and Order* in MM Docket No. 90-162, 8 FCC Rcd 3282, 3339-3342, *recon. granted on other grounds*, 8 FCC Rcd 8270 (1993).

first, therefore, to an examination of the origins of the rule and the nature of the industry at the time the rule was adopted.

III. History of the Rule

11. PTAR was originally adopted in 1970, in conjunction with the Commission's financial interest and syndication ("fin/syn") rules, following extensive preliminary studies and Commission hearings.[6] The Commission determined that "[t]he public interest requires limitation on network control and an increase in the opportunity for development of truly independent sources of prime time programming."[7] To promote these objectives, the Commission created a one-hour prime time "access" period during which affiliates in the largest markets were prohibited from exhibiting network programs or off-network programs.[8] The principal purpose of the rule, the Commission said, was to "make available an hour of top-rated evening time for competition among present and potential non-network program sources . . . so that the public interest in diverse broadcast service may be served."[9] The Commission reasoned that a prime time access period in the top 50 markets -- which then reached 75 percent of the television households nationally -- would stimulate a healthy independent syndication industry capable of producing quality programs by providing independent producers with a realistic opportunity to market programs to an adequate base of

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[6] *Report and Order* in Docket No. 12782, 23 FCC 2d 382 (1970) (*"PTAR I"*). As originally adopted, the fin/syn rules imposed broad constraints upon the financing, ownership, and broadcast syndication of television programs by television networks. Like PTAR, these rules were intended to promote diversity of program sources, and the fin/syn limitations imposed on the networks were a response to their perceived insurmountable advantage over independent producers in providing programs to their affiliates. *Id.*, 23 FCC 2d at 386. In 1991, the Commission modified the fin/syn rules, *see Report & Order* in MM Docket No. 90-162, 6 FCC Rcd 3094, *as modified, Memorandum Opinion and Order*, 7 FCC Rcd 345 (1991), but that decision was overturned and remanded to the FCC on appeal to the United States Court of Appeals for the Seventh Circuit. *See Shurz Communications v. FCC*, 982 F.2d 1043 (7th Cir. 1992). In response to the Court's remand, and after further proceedings, the Commission relaxed the fin/syn rules further and scheduled their expiration for November 1995. *See Second Report and Order* in MM Docket No. 90-162, 8 FCC Rcd 3282, *recon granted in part, Memorandum Opinion and Order*, 8 FCC Rcd 8270 (1993) (*"Fin/Syn MO&O"*). The United States Court of Appeals affirmed these actions in *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309 (7th Cir. 1994).

[7] *PTAR I*, 23 FCC 2d at 394.

[8] As a result of general industry practice, broadcasters generally schedule the access period for the first hour of prime time, but a number of affiliates in markets affected by the rule broadcast exempt network news programming for half an hour of the access period, effectively reducing the access period to a half hour.

[9] *PTAR I*, 23 FCC 2d at 397.

television stations during a lucrative time slot.[10]

12. In adopting PTAR, the Commission believed that this "modest action [would] provide healthy impetus to the development of independent program sources, with concomitant benefits in an increased supply of programs for independent (and indeed affiliated) stations."[11] The Commission also expressed its hope that diversity of program ideas would be encouraged by limiting the networks' ability to influence programming during the access period of prime time. However, the Commission cautioned that it was not its intention to "carve out a competition-free haven for syndicators" or to "smooth the path for existing syndicators."[12] Rather, the objective of the rule was to provide "opportunity -- now lacking in television -- for competitive development of alternate sources of television programs so that television licensees [would be able to] exercise more than a nominal choice" in selecting programming to present to their local audiences.[13]

13. The Commission relied on a number of facts to support its conclusion that the

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[10] *Id.* at 385-86. The top 50 markets to which this rule applies are the 50 largest markets in terms of average prime time audience for all stations in the market. Before 1980, the 50 markets were the largest 50 as listed in the Arbitron publication "Television Markets and Rankings Guide," generally applicable for the broadcast year starting the following fall. For broadcast years starting in the fall of 1980 and thereafter, the 50 largest markets to which PTAR applies is determined at 3-year intervals, on the basis of the average of two Arbitron February-March audience surveys occurring roughly 2 1/2 years and roughly 3 1/2 years before the start of the 3-year period. Shortly after the results of the 1978 survey were available, the Commission began issuing a list of the 50 largest markets for the 3-year period to which PTAR would apply. 47 C.F.R. §73.658(k), note 1. At present, the last three-year list was issued on May 11, 1993. *See Public Notice* No. 33069. We note that Arbitron no longer conducts these surveys. Accordingly, to the extent that PTAR is retained in some form, we seek comment on how we should proceed in the future to keep the market list current.

[11] *Id.* at 395.

[12] *Id.* at 397.

[13] *Id.* The Commission denied several petitions for reconsideration that challenged *PTAR I* on the grounds that it violated the First Amendment and exceeded the Commission's authority. Shortly thereafter, however, the Commission instituted a new inquiry and rulemaking proceeding, which considered modifying or repealing PTAR. Ultimately, the Commission issued a decision, *Report and Order* in Docket No. 19622, 44 FCC 2d 1081 (1974) ("*PTAR II*"), which retained PTAR in a substantially revised version. *PTAR II* never became effective when disputes over its effective date led to an injunction by the Court of Appeals for the Second Circuit staying implementation of the rule and urging the Commission to undertake additional analysis. In reviewing PTAR in the wake of the Court's injunction, the Commission decided in 1975 to abandon *PTAR II* and reinstate a slightly revised version of *PTAR I*. *See Report and Order* in Docket No. 19622, 50 FCC 2d 829 (1975) ("*PTAR III*"). *PTAR III* was generally upheld on judicial review and the *PTAR III* provisions are essentially the same as the rule in effect today.

networks were dominant in prime-time program production and distribution. For example, with regard to program distribution, the Commission observed that in 1969, only three national networks existed, and in the top 50 markets, 153 out of 224 commercial television stations were network affiliates. Nationally, there were 621 commercial television stations, of which 499 were network affiliates. Moreover, of the top 50 markets, only fourteen had at least one independent VHF television station.[14] Thus, independent programmers seeking to broadcast their products had no effective distribution alternative to the network affiliates. During prime time, control over programming and access to licensed television stations were heavily concentrated in the hands of the three networks -- affiliates only carried, on average, between 3.3 and 4.7 hours per week of non-network prime time programming, out of a total of 28 available hours. High cost, first-run syndicated programs,[15] which the Commission observed "must be most relied upon as competition for network supplied entertainment programming," had virtually disappeared from prime time.[16] Thus, the Commission noted that between 1957 and 1968, the share of all network evening programs produced or directly controlled by networks rose from 67.2 to 96.7 percent. Independent producers, who provided approximately one-third of the evening network schedules in 1957, provided less than 4 percent in 1968.[17]

14. In the years since PTAR was adopted, the emergence of new independent TV stations and the viability of new and developing broadcast networks based on these stations have led to a third rationale supporting PTAR. By restricting the program purchases available to top 50 affiliates during one of the prime time hours, PTAR created an advantage for independent stations and affiliates of new networks who were not subject to the same restrictions by decreasing the price of off-network programming for those stations. As we discuss below, parties representing those independent stations as well as new or emerging networks and affiliates of those new networks argue that they are advantaged by PTAR, and

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[14] At that time, television stations on the Ultra High Frequency (UHF) frequency band -- typically the struggling independent stations -- operated at a handicap to VHF stations due to technical limitations on their coverage area and the relative dearth of all-channel television receivers owned by consumers. This "UHF handicap" was considered an impeding factor in the early development of UHF stations, impairing their potential to contribute to diversity and competition in the marketplace of that time. *See, e.g.,* Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (1980), Volume I at 69-77.

[15] First-run syndicated programs are original programs sold directly to stations on a market-by-market basis.

[16] *PTAR I*, 23 FCC 2d at 385.

[17] *See id.* at 385-91. In addition, the Commission indicated that between 1958 and 1968, television stations in the top 50 markets decreased their prime time airing of first-run syndicated entertainment series from 1065 half hours to 833 half hours, and the number of first-run syndicated titles decreased from 154 to 103. In contrast, off-network entertainment series increased from 136 to 916 half hours, and from 26 to 90 first-run syndicated titles during this period. *Id.* at 385.

some of those parties also contend that without PTAR those new networks would never have developed. Hence, they maintain, PTAR adds to program diversity and the level of competition in program production by encouraging new networks, which, in essence, is an "infant industry" protection argument.[18]

15. In 1980, the Network Inquiry staff, an internal group convened by the Commission to examine network practices and the FCC's rules governing them, was unable to conclude that PTAR had either achieved or failed to achieve its intended objectives. According to the staff, while PTAR increased the number of first-run syndicated suppliers and distributors, it did not increase the extent of competition in the syndicated program supply or distribution markets, which the staff viewed as competitively structured prior to imposition of the rule. Since at the time of that study there were still only three major purchasers of network programming, the staff was unable to conclude that PTAR reduced "network dominance" in the sense of increasing the number of outlets or viewing options available to the public. It did, however, find that the rule by its very promulgation curbed "network dominance" by mandating a reduction in the networks' prime time schedules and requiring affiliates to obtain a portion of their prime time programming from non-network sources. Nevertheless, the staff concluded that PTAR should be repealed because, among other things, the rule did not appear to further any Commission policy to regulate in the public interest.[19] The Commission did not, however, formally adopt the staff's recommendation, and PTAR remains in force today.

IV. Recent Developments and Trends

16. Although in 1980 the Network Inquiry staff found that the structure of the TV industry had not changed in certain important ways since PTAR was adopted in 1970, particularly because there were still only three major TV networks at that time, the industry has changed quite substantially in the ensuing years. Indeed, if we compare 1994 with 1970, it is clear that the television industry has changed very significantly in the 24 years since

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[18] "Infant industry" protection theory allows the protection or insulation of an industry or industry segment from free marketplace competition for a limited period of time in order to allow for the development of viable competitors. *See* discussion *infra* at ¶ 48.

[19] Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (1980), Volume I at 510-513. In this regard, the Network Inquiry staff chiefly questioned the burden placed by PTAR on the promotion of localism and affiliates' programming choices. In response to this staff work, the Commission issued a *Notice of Proposed Rule Making* in Docket 82-345, 47 Fed. Reg. 32959 (1982), and in 1983, the Commission issued a *Tentative Conclusion and Request for Further Comments* in Docket 82-345, 94 FCC 2d 1019 (1983). Seven years later, that long-suspended docket was terminated, *Order* in Docket 82-345, and the Commission's fin/syn proceeding was commenced. *See Report and Order* in MM Docket No. 90-162, 6 FCC Rcd 3094, 3097 n.10 (1991).

PTAR was adopted. The total number of commercial and non-commercial television stations has increased 76 percent, from 862 stations in 1970 to 1,520 stations as of September 30, 1994.[20] The number of commercial independent stations (which rely mostly on syndicated programming) has grown by almost 450 percent, from 82 in 1970, to over 450 today.[21] Moreover, in 1970, the top 50 markets had 67 independent stations, or, on average, 1.3 per market. Today the top 50 markets have 289 independent stations, or, on average, 5.8 per market.[22] Despite the increase in the number of commercial television stations in virtually all respects, the number of network affiliates has remained largely unchanged.[23] By December 31, 1969, in the top 50 markets, there were 224 commercial television stations, 153 of which were network affiliates.[24] In 1994, the top 50 markets contained 480 commercial television stations, of which 167 are affiliates of the three traditional networks.[25] Finally, 65 percent of television households had access to six or more broadcast channels in 1970[26]; in 1993, 70 percent of all television households received 11 or more over-the-air channels.[27] Hence, even without considering other potentially competitive media outlets, the number of competing stations in the markets subject to PTAR has increased very substantially. Thus both the number of outlets able to purchase TV programs and the number of TV programs being shown to the average household or consumer has increased very substantially since 1970.

17. As we noted above, in 1970 there were three national television networks. Today, Fox is emerging as a fourth network, and plans for at least two additional networks -- United

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[20] FCC News Release, *Broadcast Station Totals as of September 30, 1994* (released Oct. 12, 1994).

[21] INTV Census, February 24, 1994. The number of independent stations in 1994 includes independent stations affiliated with Fox.

[22] *Id.*

[23] The reason that there has been relatively little increase in the number of stations affiliating with a national network despite the substantial increase in commercial television stations generally is that ABC, CBS and NBC already had affiliated stations in most television markets during this explosion of new television stations. In addition, the "dual network" rule, 47 C.F.R. §73.658(l), governs and limits the extent to which network-affiliated commercial television stations may affiliate with or carry the programming of more than one network.

[24] *PTAR I*, 23 FCC 2d at 385.

[25] *The Broadcasting Yearbook 1994*, C-123 - C-200.

[26] Nielsen Media Research, *Nielsen Television 1977*, at 5.

[27] Nielsen Media Research, *Television Audience 1993*, at 9.

Paramount and Warner Brothers -- have been announced.[28] Fox, launched in 1987, now has over 150 full-time broadcast affiliates, including one in each of the top 50 markets. (Fox also has over 40 part-time broadcast affiliates.) At the same time, the number of stations affiliated with ABC, CBS or NBC has remained relatively constant, with each network having, generally, one affiliate in each of the 200+ television markets.[29] The recent increases in the number of broadcast stations now provides more outlets for programming and the station base that may support the development of additional networks beyond Fox. Hence, it is clear that the three major TV networks face more competition in today's marketplace than they did in 1970 or even in 1980.

18. Accompanying these significant developments in the over-the-air television industry, new video distribution services have expanded greatly. Since the 1970s, cable TV has evolved from an embryonic retransmission medium to become a major competitor of broadcast television. In 1975, only 13.2 percent of television households subscribed to cable, compared to 62.5 percent today.[30] Moreover, cable systems now pass over 96 percent of TV households, which means that cable service is potentially available to nearly all U.S. households.[31] Wireless cable has also made significant progress from 50 systems serving 300,000 subscribers in 1990, to 143 systems serving 550,000 subscribers by June 1994.[32] Satellite Master Antenna Systems (SMATV) now serve about one million subscribers.[33] Low power television, which was first authorized in 1982, is today a viable service with 1540 stations nationally.[34] Home satellite dishes and video cassette recorders ("VCRs") were unavailable in 1970; by 1994, over 4 percent of television households owned satellite dishes

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[28] *See, e.g., Broadcasting & Cable*, August 15, 1994, at 13.

[29] In this regard, we note the recent phenomenon, reported in the trade press, of numerous switches of affiliation by local stations, many in the top 50 markets. Because of these dynamics, precise affiliate counts are not available.

[30] *Broadcasting & Cable,* October 3, 1994, at 60. In addition, cable subscribers nationally receive, on average, 39 channels (including broadcast stations and cable services), with most subscribers receiving at least 20 channels. Nielsen Media Research, *Television Audience 1993, supra*, note 26, at 9.

[31] *First Report* in CS Docket No. 94-48, FCC 94-235 (released September 28, 1994) (*"Cable Competition Report"*), at ¶ 18.

[32] *Id.* at ¶ 79.

[33] *Id.* at ¶ 92.

[34] *Broadcast Station Totals as of July 31, 1994*, FCC News Release (August 12, 1994).

and 77 percent owned VCRs.[35] Moreover, other technologies are beginning to emerge. Direct broadcast satellite ("DBS") service, which provides video programming to the home via satellite transmission to a dish receiver, is currently operational, and two DBS providers, DirecTV and United States Satellite Broadcasting (USSB), currently have capacity to transmit 216 and 20 channels, respectively.[36] DBS providers are reportedly marketing their equipment in 41 states, and they expect to offer service throughout the rest of the country in the near future.[37] Moreover, DBS home receiving equipment (consisting of an 18-inch dish, digital receiver and remote control) has reportedly sold out in the 41 states where it has been marketed.[38] DirecTV and USSB predict that by the end of 1994, the equipment will be available in approximately 10,000 locations, and that 600,000 units will be sold in 1994 and 1,000,000 units by next summer.[39] In addition, Primestar, a medium-power Ku-band service owned by six cable operators, has been operational since 1991. As of October 10, 1994, it claims 100,000 subscribers.[40] Again, the salient fact about home satellite dish signal reception, use of VCRs and now DBS, is that those technologies are potentially available to all or nearly all U.S. households.

19. The growth in the number of both broadcast and non-broadcast video outlets has greatly increased the demand for video programming. As a result, the first-run syndication market has grown substantially. Moreover, the distribution of syndicated programming has become easier and less expensive because of the availability of satellite delivery systems. The growth of cable networks has also increased demand for original programming and provided additional outlets for new first-run programs. In this regard, the number of basic cable programming networks, unavailable prior to 1976, grew from 34 in 1982 to more than 99 today.[41] In addition, syndicated programming is highly competitive with off-network

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[35] "Satellite System Sales," *Satellite Business News*, August 10, 1994, at 1; Nielsen Media Research, *1992-1993 Report on Television*, at 15.

[36] *Cable Competition Report* at ¶¶ 63-64.

[37] "Cable Gets Dished," *Time*, October 31, 1994, at 46; "DSS Reaches 100K Subs, Goes National," *Multichannel News*, October 10, 1994, at 1.

[38] "Cable Gets Dished," *Time*, *supra* at 46; *see also* "Stores Can't Keep Dishes on Shelves," *Multichannel News*, July 25, 1994, at 1.

[39] *Cable Competition Report*, at ¶ 66; "DSS Reaches 100K Subs, Goes National," *Multichannel News*, *supra* at 1; *see also* "Cable Gets Dished," *Time*, *supra* at 46 (stating that media analysts forecast that the DBS industry will pick up 8 million to 10 million customers by the year 2000).

[40] "DSS Reaches 100K Subs, Goes National," *Multichannel News*, *supra* at 1.

[41] NCTA, *Cable Television Developments*, April, 1994, at 7-A. Data prior to 1982 are not available.

programming in markets where PTAR is inapplicable. In these markets, when given the choice of how to program the one-hour "access period," the majority of broadcasters select first-run syndicated programs instead of off-network shows.[42] Indeed, seven of the top-10 ranked syndicated programs are first-run programs, two are rerun packages of first-run non-network programs (the *Star Trek*-based series), and one (*Married... With Children*) is a Fox product.[43] Moreover, the first-run syndicated programs broadcast by affiliates in the top fifty markets during the access period generally receive the highest ratings in their market, exceeding the ratings received by off-network programs aired by independent stations.[44] The syndication market has produced an increasing number of new first run programs, growing from 45 first-run syndicated programs sold in 1970 to 250 in 1990.[45] In 1990, 18 of the top 25 most popular syndicated programs were first-run.[46] Hence, by almost any measure, it is reasonable to conclude that the level of competition in the sale and purchase of video programs has increased significantly since 1970, as has the level of diversity of program producers (in terms of number of separate producers) and of programs.

20. All of the factors mentioned above suggest that the degree of competition in the purchase of programs by television outlets, in the production and sale of video programs, and

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[42] "First-Run Tops Off-Net In Prime Access," *Broadcasting*, June 15, 1992 at 33. Stations in markets 51-75, which are not subject to PTAR restrictions, selected first-run syndicated programming to fill approximately 44 (59 percent) of 75 access hour time slots. In markets 77-100, 53 (65 percent) of the 81 available time slots are filled with first-run syndicated shows. *Id.* An analysis conducted by the staff in 1992 shows that stations in markets 51-75 choose first-run programs (including local news) to fill 88 percent of the available slots during the first half hour of the access period, when affiliated stations in the top 50 markets (*i.e.*, those subject to PTAR) often run a half hour of network news during the first half hour of the access period, pursuant to the exemption that applies to such programs if preceded by one full hour of local news. In the second half hour of the access period in markets 51-75, affiliates choose first-run programming over off-network programming 65 percent of the time.

[43] The top-10 syndicated programs for the 1992-93 season were, in order: *Wheel of Fortune; Jeopardy; Star Trek: The Next Generation; Star Trek: Deep Space Nine; Oprah Winfrey Show; Entertainment Tonight; Magic II; Married . . .With Children; Wheel of Fortune* (Weekend); *A Current Affair*. Source: Nielsen Media Research, *1992-1993 Report on Television*, at 19.

[44] Arbitron Television, *Television Daypart Audience Estimates Summary*, February 1992. In markets 51-75, according to Nielsen's February 1992 ratings, the first-run syndicated shows usually receive the highest ratings. Of the 18 markets where off-network competes head to head with first-run, the first run shows finished first in ratings in every market. Flint, *First-Run Tops Off-Net In Prime Access*, *supra*, at 33.

[45] A.C. Nielsen *Report on Syndicated Programs*, November 1990.

[46] Setzer and Levy, *Broadcast Television in a Multichannel Marketplace*, OPP Working Paper No. 26, 6 FCC Rcd 3996, 4087 (1991) ("*OPP Report*"), *citing* Nielsen Station Index, *Report on Syndicated Programs*, November 1990.

in the numbers of outlets showing programs to consumers, has greatly increased. Indeed, as a result of the rapidly changing video marketplace, the overall dominance of the three broadcast television networks in the video marketplace appears to have declined significantly. In 1975, the networks collectively attained 93 percent of the prime-time viewing audience; they now obtain about 61 percent.[47] Similarly, ABC, CBS, and NBC's collective all-day viewing share has dropped 13 percentage points in the last eight years, from 66 percent in 1985-86 to 53 percent in 1992-93.[48] Both drops are mainly due to the growth of independent television stations (including those affiliated with Fox), as well as the emergence of cable networks as a significant viewer alternative.[49] The decline in network prime time viewing has had a particularly negative effect on the broadcast networks because their advantage to advertisers historically resided in their ability to deliver the mass audiences that watch television in prime time.[50] Consequently, these networks' advertising revenues peaked, in real terms, in 1984 and generally declined through 1993.[51] The drop in both audience share and advertising revenue share through 1993 indicates that the networks no longer dominate the video marketplace to the extent they once did.

21. While we are aware that in 1994 the networks realized an increase in audience share and an improvement in their revenue and profit picture in the long term, competition can only be expected to increase. The competing video delivery systems described above are predicted to increase in number, enhance or add services, and add subscribers in the near future. Cable television penetration (subscribers divided by homes passed) is expected to reach 65 percent by 1998, thus adding about seven million new subscribers over the next several years.[52] The number of subscribers to wireless cable is also predicted to grow through the end of the decade and a 10 percent increase in the number of SMATV subscribers is predicted for 1995.[53] Further, there are 24 applications from local telephone companies to provide "video dialtone" service, the provision of independently supplied video programming

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[47] *Broadcasting & Cable*, March 21, 1994, at 46.

[48] NCTA, *Cable Television Developments*, April 1994, at 5-A.

[49] In the last twenty years, cable networks' share of the national television audience has risen from virtually zero to 22 percent in prime time and 25 percent all day. Nielsen Media Research, *1992-1993 Report on Television*, at 14; NCTA, *Cable Television Developments*, April 1994, at 5-A.

[50] *OPP Report*, 6 FCC Rcd at 4019-20.

[51] The combined three network share of total television advertising expenditures nationally decreased from 44 percent in 1975 to 31 percent in 1993. Source: McCann-Erickson, Inc., *Estimated Annual U.S. Advertising Expenditures*, May 1994; *TV Factbook*, Vol. 49, at 76-a.

[52] Veronis, Suhler & Associates, *Communications Industry Forecast*, July 1994, at 119.

[53] *Cable Competition Report* at ¶¶ 79, 92.

to consumers via telephone lines, to a potential 8.5 million homes.[54] DirecTV plans to increase its DBS channel capacity and has filed an application to operate a third satellite, scheduled to be launched in early 1995.[55] In addition, five other ventures hold DBS licenses and plan to launch satellites in the next few years.[56] USSB predicts that 1-2 million DBS units will be sold within a year and 5-10 million within three years. DirecTV plans to have 3 million subscribers in three years. USSB estimates that in seven years, almost 40 percent of all television households may receive programming via DBS.[57] Primestar has begun a $55 million advertising campaign and switched to digital technology on July 31, 1994. Targeting areas unserved by cable, Primestar plans to eventually offer 150 channels and have over 200,000 subscribers by the end of 1994 and 2-5 million by the end of the decade.[58] These forecasts suggest that the number of viewing choices available to the public, as well as the number of entities buying programs, will continue to expand, thus further intensifying the level of competition and the level of diversity in the video marketplace.

V. Positions of the Parties

22. While the preceding discussion highlights the dramatic growth in the level of competition and diversity in terms of program sources and program choices, parties responding to the *Public Notice* tend to espouse different interpretations of the facts described above. Some argue that in today's highly competitive, diverse video marketplace, PTAR is no longer necessary or desirable because it may adversely affect the efficient operation of the programming marketplace and, at a minimum, should be modified. In contrast, others contend that PTAR is at least partially responsible for the diversity and the level of competition in the modern broadcasting marketplace and must be retained to assure further increases in diversity and competition. The "off-network" restriction in particular drew a particularly high volume of comments by parties on both sides of the issue. We summarize those views below.

A. Repeal or Modification of PTAR

23. In the submissions referenced in the April 12, 1994, *Public Notice*, Channel 41, Inc. and Hubbard Broadcasting, Inc. seek repeal of the off-network restriction, arguing generally that such a restriction can no longer be justified in light of the technological and

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[54] *Id.* at ¶ 104.

[55] *Cable Competition Report* at ¶ 64.

[56] *Cable Competition Report* at ¶ 67.

[57] *Cable Competition Report* at ¶ 70.

[58] *Cable Competition Report* at ¶¶ 68, 70.

marketplace changes that have occurred since the adoption of PTAR. They maintain that the objectives of the off-network restriction -- to curb network dominance and promote a healthy first-run syndication market -- have largely been accomplished by technological advances and the growth of first-run program buyers, including cable and independent stations. Additionally, a wide array of commenters including CBS and NBC, network-affiliated station owner Bonneville International Corp. ("Bonneville"), the Network Affiliated Station Alliance ("Affiliate Alliance"), the Office of Communications of the United Church of Christ, *et al.* ("UCC"), and Westinghouse Broadcasting Co., Inc. ("Group W"), the original proponent of PTAR, agree generally that the substantial changes in the video marketplace since the adoption of PTAR have reduced the ability of the networks to dominate program production and distribution. They assert that the off-network ban has run its course and now operates to place the traditional networks, their affiliates and those that supply programming to the networks at a competitive disadvantage.

24. These parties also argue that the off-network restriction unfairly favors emerging networks and non-network program suppliers. By way of example, NBC asserts that Fox, which is not now subject to PTAR, reaches 97 percent of all television households and successfully competes against the original three networks for audience, advertising, programming and affiliates. NBC and others argue that so long as an "emerging network" programs no more than 15 hours of prime-time, such networks can develop programming and bid for first-run syndicated programming with the knowledge that, unlike ABC, CBS, or NBC, such programming can be resold in syndication to all stations, network and independent alike. The Coalition to Enhance Diversity ("the Coalition")[59] further maintains that regardless of Fox's legal status as a network, Fox programming product competes with traditional off-network programming in the syndication market, giving it an unfair advantage over ABC, CBS, NBC and producers of programming for them. In this regard, the Coalition and others such as CBS and the Affiliate Alliance assert that the off-network ban is protectionist and anti-competitive, because network affiliates in the top 50 markets are foreclosed from competing on an equal basis with independent and Fox-affiliated television stations and cable channels available in their markets.[60]

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[59] The Coalition states that it represents various public interest and consumer groups, independent program producers, production companies, broadcasters and trade unions.

[60] Group W states that the off-network ban treats similarly situated networks in a patently unfair manner, a situation it believes will be exacerbated by shifting network affiliations, particularly as network-affiliated stations subject to PTAR suddenly become exempt by switching affiliation to, for example, Fox, which is not now an entity subject to PTAR. Group W states that the safeguards incorporated into the off-network ban are not designed to deal with this phenomenon in a manner equitable to all stations, suggesting that Fox could continue to function as a fully competitive network without ever meeting the definition of a network for purposes of PTAR. Group W therefore urges that in this environment, Fox should be subject to the same PTAR limitations, or lack of them, applicable to the traditional networks.

25. Commenters opposed to the off-network ban also contend that it has not worked as originally envisioned to stimulate diversity of program production. Rather, they maintain that the prime time access period is dominated by three program suppliers (King World, Paramount and Fox) and four shows (*Wheel of Fortune, Jeopardy, Entertainment Tonight* and *A Current Affair*). According to NBC, these three program suppliers account for 93 percent of the programs acquired for and broadcast during the access period in the top 50 markets, dominating the first hour of prime time to the same extent as the national networks dominated that time period in 1970 when PTAR was established.[61] The Coalition maintains that if the Commission properly considers all options available to video consumers in the modern video marketplace, including the plethora of new services, it will find that the magnitude of profound industry changes compels revocation or modification of PTAR as has been done with other longstanding network and ownership restrictions found to be no longer warranted.[62]

26. In addition to these arguments for repeal of just the off-network part of PTAR, First Media, Channel 41 and Hubbard contend that the entire rule is constitutionally impermissible. They assert that the rule: (1) can no longer be justified under a "scarcity" rationale; (2) impermissibly creates two classes of speakers -- "favored" speakers (*i.e.*, independent program producers) and "disfavored" speakers (*i.e.*, national networks and their affiliated stations) -- and treats them differently; and (3) cannot be sustained under the stricter constitutional scrutiny standard, which assertedly must be used because PTAR is a content-based restriction on speech (*i.e.*, news, public affairs, documentary, sports and children's programming are exempt from PTAR while entertainment programs are not). Those parties filing comments favoring repeal of the rule on economic or policy, as opposed to constitutional, grounds generally frame their arguments in terms of the off-network restriction. Their arguments appear to be equally applicable to the entire rule, however. In sum, the proponents of elimination of the rule believe it no longer serves the public interest and, instead, upsets the competitive balance between network affiliates and independents (or affiliates of emerging networks).

B. Retention of the Status Quo

27. A number of commenting parties urge retention of PTAR as it currently exists. These parties -- including the Fox Broadcasting Company Television Affiliates ("Fox

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[61] *See* NBC Comments at 14. In addition, it claims that for the 1992-1993 television season, the top-six first-run syndicators (King World, Paramount, Disney, Multimedia, Warner and Fox) controlled over 72 percent of the total first-run syndication market, with three of these companies (Disney, Warner and Fox) also providing 49 percent of the outside-supplied entertainment series premiered on the three traditional networks that season. *Id.* at 22-23. Similarly, the Coalition contends that ten first-run programs are broadcast in 71 percent of the affiliate access periods in the top 50 markets, with 49 percent of those access time periods filled with just four shows. The Coalition Comments at 5-6.

[62] The Coalition Reply Comments at 6-7.

Affiliates"), the Association of Independent Television Stations, Inc. ("INTV"), King World Productions, Inc. ("King World"), Media Access Project ("MAP"), and Viacom, Inc. ("Viacom") -- support the existing rule for a variety of reasons. For instance, Fox Affiliates point to the rule as responsible for their achieving viability and, in turn, facilitating the development of Fox.[63] They therefore urge the retention of PTAR in the belief that no legal or policy grounds exist that support repeal or modification. Others, such as MAP, King World and Viacom, believe that any exploration of the continuing need for PTAR must be preceded by a Notice of Inquiry exploring a host of issues, including but not limited to the current and future status of independent stations and the first-run syndication industry. INTV has also argued that the mere adoption of a notice of proposed rule making concerning PTAR will adversely affect independent stations by inducing network affiliates to purchase the rights to broadcast off-network shows in the access period in the event the rule is modified. INTV maintains that these purchasing efforts will irreparably harm independent stations by bidding up the prices of off-network shows they purchase or by outbidding them altogether and depriving them of their most valuable programming. They argue that any action on the rule should await a settling of the new regulatory landscape produced by the scheduled expiration of the current financial interest and syndication rules. Additionally, some proponents of PTAR, such as MAP, contend that the rule has stimulated diversity and should be retained.

28. MAP, which favors retention of the off-network ban, states that, irrespective of market changes that have taken place, over-the-air broadcasting remains the primary source of news and entertainment programming, especially for the 40 percent of Americans who cannot afford or choose not to subscribe to cable. It asserts that the perceived explosion of new communications technologies, and the diversity expected to follow, has not occurred. MAP states that the combined audience share of *all* the national cable networks does not even remotely approach any one of the three major broadcast networks. MAP therefore maintains that while there are now more program outlets generally, they are not genuinely and equally competitive, and that the original networks have retained inordinate dominance over the marketplace. This power, it believes, is likely to be enhanced significantly by the imminent demise of the fin/syn rules. In this regard, MAP states that the traditional networks have the most established resources and viewership, the strongest and most established local stations as affiliates, and still broadcast the vast majority of the news, public affairs, entertainment and sports programming, although Fox is making substantial inroads in these regards.[64] MAP also points to the fact that, unlike some of the newer video distribution services, the traditional broadcast networks reach virtually all television households, a fact reflected in their higher advertising rates.

29. Fox Affiliates and INTV contend that no showing has been made that the Top 50

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[63] Fox itself, however, favors repeal of the rule.

[64] MAP Reply Comments at 9-12. In addition, it states that even if the off-network ban favors Fox over the traditional networks, the rule should not be eliminated simply because it has worked in Fox's case.

Market Affiliates are significantly harmed by their inability to air off-network syndicated programming during prime-time access. Rather than causing a competitive imbalance, Fox Affiliates claim that the off-network restriction has enabled them to survive as independent stations, and ultimately to grow as affiliates of Fox and achieve a more competitive position *vis-a-vis* established network affiliates in their markets, precisely because the restrictions on the affiliates of the three largest networks increase the Fox affiliates' ability to acquire attractive programming, particularly highly popular off-network programs. They further believe that any perceived competitive harm to stations subject to the off-network ban is overstated because the first-run syndicated shows aired by Top 50 Market Affiliates during the access period attract larger audiences than the off-network shows broadcast by independents. Moreover, they note that independent stations generally operate at a competitive disadvantage in that the Top 50 Market Affiliates are, for the most part, larger and more established VHF stations, contributing to their dominant market share and superior bargaining power over predominately UHF independent stations. Thus, they contend that any decrease in the ability of independent stations to air popular off-network programming in the access hour will jeopardize their economic ability to realize their overall programming plans, including expansion into local news and other high-quality programming. They therefore state that elimination of the off-network restriction will seriously curtail the full potential of these independent stations to maximize program diversity and achieve competitive parity with the affiliates of the established networks or to offer a viable core of stations for the development of alternative television networks.[65]

30. Other supporters of the off-network ban, particularly first-run syndicators, claim that without the present rule, off-network programs will be aired by Top 50 Market Affiliates during the access period because of their proven audience appeal, diminishing the ability of new and untested first-run syndicated shows to garner sufficient audience share to sustain and develop the diversity it provides.[66] In this regard, King World claims that the fundamental difference between first-run and off-network syndicated programming is that first-run programming is generally untested and does not have the built-in audience demand of former network programming. It states that the production of first-run programming is a risky financial venture because the program producer must create a wholly new audience on a market-by-market basis, making access to viewers during the peak viewing hours of prime time essential to the first-run syndicator. King World asserts that the audiences needed to successfully launch a new first-run program cannot be reached unless there is potential access to a market's dominant stations -- the network owned and affiliated stations in all of the Top 50 markets. King World believes that without PTAR, first-run syndicators will be chiefly dependent on independent stations for access to audience, and that most independent stations

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[65] Fox Affiliates Comments at 2-3.

[66] *See, e.g.,* Viacom Reply Comments at 4 (If the off-network restriction is repealed, "an unrestricted auction of off-network series would occur, and would be won . . . by the richer network affiliates.").

do not provide the audiences which the first-run syndication industry requires.[67] Further, King World claims that programs successfully launched during the access period provided by the off-network ban are the economic foundation for the development of all first-run syndicated programming. It therefore maintains that PTAR serves what King World believes was its intended purpose because the marketplace itself will not provide the kind of access to the audiences which first-run syndicated programming needs to be successful.[68]

VI. Proposed Analytical Framework for Evaluating the Efficacy of PTAR

31. As discussed above, the Commission created PTAR as a reaction to a marketplace that it believed was functioning without sufficient competition and had yielded inadequate levels of diverse programming. In order to correct the perceived lack of competition and diversity, the rule altered the competitive opportunities in the relevant markets in three basic ways. *First*, by carving out a portion of prime time to be used for non-network use, the rule made it easier for independent producers to sell their programming to the more successful stations in the top markets (*i.e.*, affiliates of the three major networks). Among the intended effects was the goal of strengthening existing independent producers and encouraging entry of new ones. From an economic perspective, the Commission anticipated that the decrease in supply of programming available to affiliates (caused by PTAR's ban on network and off-network programming) would increase prices paid for independently produced programming, thus acting as a spur for greater production and new entry.[69] Thus, the Commission predicted that the rule would increase the net amount of diverse programming available to the viewing public and create new competitors to the existing three networks. *Second*, the rule sought to reduce the networks' role in dictating their affiliates' programming choices, by forbidding the affiliates in the top 50 markets from running more than three hours of network or off-network

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[67] King World Comments at 8-10. Moreover, King World states that because of the importance of the top 50 markets to first-run syndication, the fact that first-run programming may compete successfully in markets below the top 50 is irrelevant. *Id.* at 10.

[68] King World maintains that even if the access period is currently dominated by only a few companies, such a result is a function of the marketplace in which PTAR allows them access to compete, and the rule has added at least three meaningful independent voices where none existed before. Moreover, although there are now a few successful first-run syndicators, King World maintains that they do not, individually or collectively, possess market power on the scale of the networks and do not have the access the networks have over their affiliates -- the dominant stations in the top 50 markets. *See* Reply Comments of King World at 3-5.

[69] This economic assessment does not appear to take into account the fact that the networks not only produced programs themselves, but they also could (and did) purchase programs from non-network sources for broadcast over their affiliates. Thus, the networks occupied positions as program purchaser, program supplier and program producer. To the extent the networks purchase non-network programming for distribution to their affiliates, the demand for such "independent" programming is unaffected by a restriction like PTAR.

programming during the four-hour prime time period. Thus, the rule was viewed as a way to increase affiliate autonomy and reduce network dominance.[70] The immediate effect was to ensure that not all of an affiliate's prime time programming came through the same network filter. *Third*, the rule has come to be viewed as a mechanism for strengthening independent stations, with the result of increasing the strength and number of the primary buyers of independently produced programming. The argument is that, with this increase, not only are the number of independent program producers increasing, but the opportunity for new networks to emerge and compete with the existing networks is enhanced (by the presence of a healthy pool of independent stations). Thus, by strengthening independent stations overall, the rule has been considered to further both diversity and competition goals. Moreover, the independent stations themselves produce some degree of original programming, which contributes to the overall levels of diverse programming available in the market.

32. In 1970, there was a strong case for taking government action to correct the effects of a competitively unbalanced market. However, with the development of alternative forms of video distribution, the growth of the broadcast industry (including increased competition among networks for affiliates), and the increase in the number and type of entities creating nationally distributed video programming, we must assess the continued efficacy of a rule like PTAR. We therefore undertake a rigorous economic and policy analysis in this proceeding to assess the extent to which the rule serves the Commission's "public interest" mandate to maximize consumer welfare, as opposed to merely protecting individual competitors in the communications industry.[71] Accordingly, we seek to evaluate the factual and economic assumptions underlying PTAR to ascertain whether the rule operates to achieve its intended effects, and what unintended effects it may also cause. In addition, our analysis will evaluate whether the intended and unintended effects further the attainment of legitimate goals in today's world. As in every analysis of this nature, the ultimate decision to retain, modify or eliminate the rule will turn on a weighing of its costs against its benefits. To permit us to perform this analysis, the following three sections ask a series of specific questions about the three above-described ways in which PTAR alters the competitive opportunities in the relevant markets, followed by a section that seeks comment on the overarching issues and ultimate cost/benefit calculation.

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[70] While the rule did not eliminate all constraints on affiliate programming choices, the Commission viewed the rule's constraints as less restrictive than those imposed by network practices. Before PTAR was promulgated, the networks affirmatively selected all programs during prime time for their affiliates, assertedly regardless of affiliate preferences. The rule, on the other hand, imposes a negative constraint, leaving affiliates free to select from the range of all non-network sources.

[71] *See, e.g., Memorandum Opinion and Order* in MM Docket No. 87-24, 4 FCC Rcd 2711, 2723 (1989) (stating that the Commission's "goal is, of course, to see that the *public* interest is served, not to maintain an inefficient distribution scheme that favors [certain competitors]") (emphasis in original).

A. Increasing Opportunities for Independent Programmers

33. With respect to the first method of altering competitive opportunities -- PTAR's creation of a window of opportunity for independent producers to supply programs to the Top 50 Market Affiliates for broadcast during prime time -- we raise three critical questions that go to the actual operation of the rule: (a) whether this enhanced opportunity increases the net amount of independently produced programs available to the public, (b) whether this opportunity increases the net number of independent program producers serving the market,[72] and (c) whether the limit placed by this opportunity on an affiliate's ability to carry network or off-network programming during the access period reduces the economic value of network programming aired during the other parts of prime time, by limiting the potential buyers for these programs after the network run is complete, thereby depressing the total return on these programs.

34. The carving out of a time slot for independently produced programs would appear to increase the demand for them, thus raising prices and encouraging entry of new firms producing such programs. Indeed, since PTAR was established, successful, independently produced programs like *Wheel of Fortune* have been added to the mix of programs available to the public, and at least several powerful independent suppliers of broadcast product have developed.[73] Proponents of PTAR have also argued that independent producers as a group cannot effectively survive unless they can launch their programming over network affiliates in the top markets, and that PTAR is the only assurance that they have that opportunity;

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[72] Both effects -- increasing the number of independent producers and increasing the number of independently produced programs -- have been viewed as important. In 1970, there was very little independently produced programming, so the rule created a virtual guarantee that the amount of it reaching the public would increase -- by reserving a portion of prime time for such programming. Diversity goals have also emphasized the link between a variety of program sources and the variety of programs themselves. Thus, a market has not been considered diverse if only a few sources supply all the programming, even if the range of programs is quite varied. Accordingly, we would discount to some degree the diversity value of a net increase of independently produced programming if the net number of producers did not appreciably increase. Opponents of the rule have made the argument that the number of producers developed by virtue of the rule is small. The argument against discounting the diversity value too much is that any increase in absolute number of producers is a benefit, and that a significant increase in the amount of programs themselves, even if emanating from the same source, is a significant improvement over a world where virtually all home-viewed video programs came from one of three sources.

[73] It would appear that the number of independent suppliers that PTAR assertedly develops is limited by the amount of access time made available. Proponents of PTAR have argued that the success of an independently produced first-run program depends on a high percentage of clearances nationally; without this level of clearance, the funds for the program are insufficient to sustain it. Thus, one would expect to see only a handful of programs running on a given time slot at any one time. This effect would limit the number of new independent programmers fostered by the rule.

according to this argument, once the protection of PTAR is lifted, an entire segment of program supply could wither, leaving, over the long run, a significant reduction of total program suppliers. However, the opportunity for independently produced programs to occupy a portion of prime time without competition from network or off-network programs may create at least two additional effects. First, the loss of opportunity to program the access period[74] would appear to create incentives for those program suppliers who are barred from this period to shift their sales efforts to the next best venue. Presumably, then, some of their product displaces independent product that would appear outside of prime time. While we do not have sufficient data to quantify this effect, it may be that this loss of independently produced programming outside of prime time exceeds the gain within prime time.[75] We ask commenters to submit studies detailing such patterns of programming in all dayparts since PTAR was adopted. Second, the loss of opportunity of the three major networks to provide programming to their affiliates during the access period reduces by three the number of entities that might otherwise purchase new programs from independent program producers.[76] This reduction of demand by networks for new product may tend to reduce prices paid for such programs overall, along with the amount of programming produced and incentives for entry by new firms. To enable us to assess the weight of these arguments, we ask commenters to present data and economic studies to demonstrate PTAR's net effect on independent program production and producers, given all these considerations.

35. One conceptual criticism of the rule's current ability to encourage diverse programming through the creation of a window of opportunity for independent programmers is that economic incentives -- rather than the source of the programming -- may play the greater role in determining the diversity of program type the public sees. Presumably, the network affiliates will select the type of programming most likely to gain the largest audience, whether that is a game show or a comedy or drama series.[77] Thus, the presence or absence of

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[74] Entities suffering this loss of opportunity include syndicators of off-network product, as well as the networks themselves, who supply first run network product and, with the impending removal of fin/syn restraints, will be able to supply off-network product without limitation.

[75] We recognize that more viewers watch television during prime time than in other dayparts, but to the extent that the loss of independent programming outside of prime time is significant, diversity goals are nevertheless impaired, and the overall health of the programming industry may be impaired as well.

[76] We acknowledge that a program that passes through the network filter is not considered "independent" in the same sense as one that is placed directly by the independent producer in the hands of a station. However, in both cases, the station's position between producer and audience reduces the independent nature of the program. Moreover, in today's marketplace, many producers are regarded as "independent" despite the fact that they sell programming to the major networks.

[77] We acknowledge that affiliates may be influenced by a variety of factors other than a calculation of how much audience a particular program may garner. For example, parties have asserted that with the lifting of fin/syn constraints, the networks will have the incentive and

PTAR may have little effect on the diversity of program types available to the public. On the one hand, if network or off-network programming tends to garner the most audience, and the affiliates are precluded from airing such programming during the access period, rather than purchasing less established forms of the same type of programming, the affiliates may have the incentive to counterprogram with very different types of shows. This appears to reflect how the market, in fact, has developed; during the access period, network affiliates tend to air game shows and news magazine programs, while competing independent stations tend to air network reruns. On the other hand, if PTAR were eliminated and the network affiliates outbid the independent stations for the most popular off-network fare, presumably the independent stations would have the same incentive as the network stations do now to counterprogram with different types of shows than network or off-network programs.

36. Independent stations, however, have typically competed at a technological disadvantage (since most are UHF-based), and the argument has been made that the supply of independently produced programming would not have developed like it has if the independent programmers did not have access to the top market affiliates to launch and establish the platform for their programs' success. We ask whether in today's marketplace, particularly with cable leveling the technological differences between UHF and VHF stations for the 62.5 percent of television households that subscribe to cable, this dynamic still pertains. Would the level of diversity of programming diminish if we eliminated PTAR?

37. PTAR's limit on the ability of affiliated stations to air network programming may also reduce the overall return to producers of such programming (whether the networks or independent producers) by eliminating prospective bidders for the programs in the "after-market." Generally, network programs are produced and aired on the network at a deficit. This deficit, and any profit to be made by the producers, is recovered after the program leaves the network and is sold in syndication. By eliminating as bidders for these programs those stations that are commonly the strongest -- the top 50 market network affiliates -- the total return to producers would likely be reduced. The question posed by this analysis is whether the reduced return to producers is significant and whether it, in turn, would lead to reduced investment in first-run network shows and ultimately to lower quality network programming. We ask commenters to supply any data or analysis that would permit us to more fully evaluate this possibility.

38. In predicting the effects of PTAR on independent program supply and the programmers of such fare, we note that heretofore the three major networks have not competed directly with the independent programmers because of the constraints of the fin/syn rules. The old fin/syn regime generally prohibited the networks from syndicating

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opportunity to convince their affiliates to purchase network syndicated product even if such product may not perform as well in the market as some other independently produced syndicated program. Similarly, affiliates enter into long term affiliation contracts, which may prompt the affiliate to air a less lucrative program that it would not have chosen to air absent the contract. In providing their analyses, commenters should address these factors.

programming or holding continuing financial interests in programming once it entered the syndication market. These constraints, however, are being phased out. The networks' increasing opportunities to own programming and direct its flow through the market will have some effect on the performance of independent program producers and their ability to compete. However, it is not clear whether these new network opportunities are significant enough to warrant a regulatory constraint like PTAR. Accordingly, we ask commenters to address the relationship between the operation of PTAR and our findings in the fin/syn proceeding, where we determined that there did not appear to be any economic justification for continued restraints on the networks' ability to own financial interests in broadcast programming or to syndicate such programs.[78] Clearly, our recent conclusions in the fin/syn proceeding are relevant to our analysis of PTAR; both sets of rules were implemented at the same time in response to the same perceived market dysfunction. When we scheduled the expiration of the fin/syn rules, we concluded that the networks lacked sufficient power to control the programming market, including syndication and program production, despite the networks' influence over an extensive web of affiliated stations. We now ask for comment on whether there is any reason to assume that the networks possess sufficient power by virtue of their role in providing prime time programming to their affiliates to alter the performance of the marketplace in ways that negatively affect the public interest.

39. Similarly, we ask commenters to address the question of how the fin/syn changes will affect our assessment of network power in the PTAR context. Proponents of the rule maintain that with the projected demise of fin/syn, the protections of PTAR for independent producers are all the more critical. Moreover, these parties argue that PTAR now operates as a significant remaining safeguard for independent stations. According to this argument, fin/syn ensured that the independent stations would not have to negotiate with the networks for the most valuable syndicated fare, and PTAR ensured that the independent stations' primary competitors -- the network affiliates -- would have a reduced incentive to bid for such programs (because of limits PTAR places on when such programs can be aired). Opponents of PTAR dispute these views, maintaining that the Commission's findings in the fin/syn proceeding provide a basis for concluding that PTAR is likewise unnecessary to ensure programming source diversity.

B. Reducing Network Ability to Dictate Affiliate Programming Choices

40. With respect to the second method of altering competitive opportunities -- limiting the networks' power over their affiliates by reducing network ability to influence programming choices during the access period of prime time -- PTAR prohibits the affiliates from obtaining network provided programs or even off-network programs during that period. In 1970, when it adopted PTAR, the Commission concluded that this was a reasonable method of protecting affiliates against the power of the networks. At that time the affiliates were quite dependent upon the networks as the major source of programs, and thus the

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[78] *See, e.g., Fin/Syn MO&O*, 8 FCC Rcd at 8278-82.

affiliates may have felt that even if it was not in their economic self interest to accept all the programs offered them by the networks, they did not have sufficient bargaining power to refuse to run the programs. Thus, even though the rule limited the options available to affiliates during one hour and consequently limited to the same extent the viewing options available to consumers, nonetheless the affiliates may have believed they were better off with the rule than without the rule, given the dominant position of the three networks. In practical effect, the rule was intended to increase the chances that the programming appearing on an affiliated station would reflect true viewer preferences. The view was that while the network would dictate one program for the access period, the rule would permit the affiliate to choose from a range of choices (*i.e.*, any independently or affiliate produced program).

41. In 1994, however, as we have discussed above, the relative position of the affiliates *vis-a-vis* the networks has changed. First, there are options available to network affiliates that were not available in 1970, especially the possibility of changing their affiliation. The press has recently reported that a number of affiliates have switched from one of the three major networks to Fox, an event that would appear to indicate that the major networks are not as dominant as they were 24 years ago. Clearly, to the extent an affiliate has the option of leaving a network to associate with another entity, that affiliate's bargaining position has improved. Second, there are today many more options for obtaining programming even without having a network affiliation, as indicated by the growth in the number of independent, unaffiliated stations. Hence, while network affiliates would likely prefer not to give up their affiliations, they appear to have a greater range of alternatives than they did two decades ago.

42. Thus, it is not clear that at this time regulatory protection for the affiliates against their networks is necessary to ensure that programming choices are made competitively and in a manner that more accurately reflects viewer preferences. Indeed, in an increasingly competitive video marketplace where the affiliates and networks must compete not only against more over-the-air outlets but also against cable networks and other multichannel media providers, it seems increasingly unlikely that the networks would attempt to force their affiliates to take unpopular programs or programs necessarily different from those the affiliates themselves would choose. For at least some affiliates, even if not for all of them, it may be that this rule now limits their choices and thus the choices of their viewers in ways that harm both the stations themselves and their viewers. We recognize that data submitted thus far in this proceeding indicate that current independently produced programs aired during the access period tend to garner very high ratings compared to competing programs in that timeslot. Accordingly, elimination of PTAR may not immediately result in significant changes in affiliate programming choices. However, elimination of the rule could offer the affiliates greater opportunity to respond to changes in ratings, and thus to serve their audiences more effectively, assuming that the networks lack the power to force their affiliates to make uneconomical programming decisions.

43. On the other hand, the Commission has historically recognized that the nature of networking generally places the network in a more powerful position than any one of its

affiliates. Thus, while the relative power of affiliates and networks may vary from market to market, individual stations appear to have a greater inherent need for the benefits of network affiliation (*i.e.*, a ready supply of proven programming) than a network does for an individual affiliation.[79] Moreover, the rise in number of independent stations may have increased the demand and competition for the most lucrative network affiliations, thus reducing, at least to some degree, the increased leverage the network affiliates appear to have gained as a result of the potential emergence of new networks. Finally, some have called into question the conclusion that the networks lack the power to force their affiliates to make uneconomical programming decisions.[80]

44. Accordingly, we ask commenters to provide evidence regarding the bargaining position of affiliates *vis-a-vis* their networks. For example, during hours other than the PTAR access period, do affiliates in the top 50 markets carry programs other than network programs? To what extent does the market dynamic in the top 50 markets dictate performance in the less populated markets?[81] Are the recent affiliation switches indicative of a change in the relative bargaining power of the networks and their affiliates, or are these switches due to other factors? How will the possible emergence of two new networks affect this bargaining power? Do these facts or other relevant information indicate whether affiliates would change their behavior in terms of the programs they showed during the access hour if PTAR were modified or repealed? To the extent that the behavior of affiliates might change in some way if PTAR were modified or repealed, how would that affect the programs ultimately available to viewers? Similarly, to the extent that we decide to modify or repeal the rule despite concern about the power of the networks over their affiliates, should we consider increasing our oversight of other aspects of the network-affiliate relationship? For example, there are a number of rules that circumscribe permissible terms of network-affiliate

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[79] *See, e.g., Report & Order* in Docket No. 12746, 27 FCC 697, 713 (1959), *aff'd sub nom. Metropolitan Television Co. v. FCC*, 289 F.2d 874 (D.C. Cir. 1961). We recognize, however, that affiliates have formed groups that counterbalance, to some degree, the power of their networks.

[80] *See, e.g.*, NASA Comments in MM Docket No. 91-221 (Review of the Policy Implications of the Changing Video Marketplace), at 17. In addition, recent press accounts report that certain network-affiliated stations have accused their networks of intimidation or retaliation in response to those stations considering the broadcast of football games carried by Fox. *See Broadcasting & Cable*, April 11, 1994, at 18.

[81] Parties like The Walt Disney Studios have submitted data indicating that in markets not subject to PTAR (those below the top 50), stations choose programming similarly to those in the top 50. *See, e.g.*, The Walt Disney Studios, *PTAR Top 50 Market Access Position Paper* (dated April 1994). In response, proponents of PTAR have argued that ratings performance in markets below the top 50 cannot be used to predict performance in a world without the rule. These proponents point out that the advantage given by PTAR in the top 50 markets provides the independently produced program with a chance to garner a national audience, which is assertedly critical for then marketing that program successfully in the rest of the country. Commenters submitting data on markets currently not subject to PTAR should address this criticism.

business relations, which could be strengthened or broadened if the public interest required.[82] Finally, those arguing that the networks do retain significant bargaining power should present evidence that, absent PTAR, this power would be exercised in ways that disserve the public interest. Similarly, those arguing that the networks do not retain significant bargaining power should likewise present evidence that PTAR is impairing their ability to serve the public interest.

C. Providing Independent Stations with the Competitive Advantage of Greater Programming Choices

45. The third method we have identified by which PTAR alters competitive opportunities is that it provides independent stations with a competitive advantage over competing network affiliates. Specifically, since the Top 50 Market Affiliates have a more limited range of choices in placing programming on their stations, the independent stations receive two competitive advantages: (a) less competition for viewers, and (b) less expensive programming. The rationale for giving these advantages has been explained as a correction for inherent competitive disadvantages shouldered by independent stations, such as the technological impediments they face by virtue of the fact that most of them have been relegated to the UHF band.

46. In addition to placing independent stations on a more competitive par with the affiliated stations, PTAR has also been defended as a means to increase the diversity of programming outlets. Traditionally, the Commission has evaluated such diversity in terms of the broadcasting industry. If one takes this perspective and assumes that PTAR has played this role in the past, is PTAR still necessary to ensure such diversity? To what degree do independent stations continue to suffer appreciable fixed competitive disadvantages, particularly in view of the leveling effect that cable carriage has on broadcast signals? In this regard, we note that while cable carriage reduces the UHF disadvantage (at least for the 62.5 percent of television households that subscribe to cable), there may be problems that carry over to the cable medium (*e.g.*, channel positioning disadvantages). Even if fixed disadvantages on cable were eliminated altogether, how should the Commission weigh the fact that over 30 percent of viewers currently rely on over-the-air signals exclusively? Does the disadvantage that the UHF-based independent stations still have over-the-air continue to support an argument for PTAR? Commenters should factor all these elements into their analyses.

47. On the one hand, the array of broadcast options can be characterized as varied and competitive now. There are over 450 independent stations; a strong new direct competitor to the established networks (*i.e.*, Fox); and several incipient networks poised for development.[83]

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[82] *See, e.g.*, 47 C.F.R. §§ 73.658 (a) - (i).

[83] *See supra* ¶¶ 16-21 for a detailed discussion of the range of competitors in the broadcasting industry.

The question then becomes whether, given this level of diversity, the competitive alteration that PTAR causes with respect to a segment of the market (*i.e.*, the affiliates and the major networks) is warranted. Commenters are asked to address the degree to which, from economic and public interest perspectives, PTAR leads to misallocated resources, limits viewers' programming choices, and alters the optimal prices paid.

48. On the other hand, it can be argued that over the long run competitiveness within the broadcasting industry is enhanced by the strengthening of the independent station base. Specifically, it can be argued that PTAR provides "infant industry" type protections and thus competition enhancing benefits. By restricting the choices of network affiliates in the top 50 markets, PTAR has the effect of both enhancing the market for new first-run programming not under the control of the networks and also helps independent stations in those markets obtain off-network programming at somewhat reduced prices.[84] This, in turn, is said to increase the economic viability of "near" networks such as Fox,[85] as well as other potential networks such as United Paramount and Warner Brothers, all of which depend on the availability of numbers and economic strength of affiliated stations to form a base for the launch of new networks.[86] Indeed, proponents of PTAR have argued that if affiliates of potential new networks have to bid against existing major network affiliates for the best programs, they will lose out in such a bidding war, will not obtain the desired programs, and ultimately, their networks will not be successful.[87] Finally, it is argued that while, in the short

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[84] Indeed, we have recognized the financial importance to independent stations of obtaining popular off-network programming. *See Fin/Syn Evaluation (Memorandum Opinion and Order)*, 8 FCC Rcd at 8294 n.64. Moreover, the value to independent stations of popular off-network programming is not limited to the immediate effects during the time the particular program is aired. Rather, the proponents of PTAR have observed that success during the access period -- which is enhanced by airing popular off-network fare -- enables the station to carry over audience viewership into adjacent prime time hours.

[85] Indeed, the benefits of PTAR appear to have contributed significantly to Fox's success. Fox's base of affiliates have relied heavily on off-network fare to compete effectively with the major network affiliates. Moreover, Fox product that enters the syndication market (*i.e.*, programs that have completed their first run on Fox) are not classified as off-network programs and are consequently marketed without any PTAR-based restrictions, thus increasing their value. Again, this appears to have contributed to Fox's success. We request more specific comment on the degree to which Fox's success is directly linked to PTAR.

[86] In other words, for any new broadcast networks to develop, there must be a base of successful independent stations, whose success could be jeopardized by the elimination of PTAR.

[87] The affiliates of would-be networks will generally come from the ranks of the independent stations, which are generally less financially successful than the network affiliates. Indeed, there is evidence, now somewhat dated, that supports the proposition that independent stations will tend to lose bidding wars against affiliates of established networks. *See, e.g.*, *OPP Report*, 6 FCC Rcd at 3999 ("Although broadcasting will remain an important component of the video mix, small market stations,

run, television viewers' choices might be reduced because of the limits on the Top 50 Market Affiliates, in the longer run, consumers will gain because of the development of stronger independent sources of programs, stronger independent stations and additional television networks that can compete with the major three networks.

49. We ask for comment on the above analyses. Parties should also address whether regulatory measures designed to encourage the introduction into the broadcast industry of increased competition in the form of new networks remain necessary when the established networks and their affiliates are also competing against non-broadcast video services. In other words, by limiting the programming prerogatives of the strongest players in the broadcast industry, over time how will PTAR affect the ability of this industry as a whole to survive against its non-broadcast, multichannel competitors? Moreover, we ask whether any inefficiencies of encouraging entry of new networks by placing limits on incumbents are outweighed by real benefits. Parties should identify and quantify these inefficiencies and benefits.

D. The Overarching Issues

50. The above discussion constitutes an analytic framework that should permit us to determine whether PTAR, as it operates in today's marketplace, in fact creates the appropriate market incentives to achieve certain results. Assuming these results, we now turn to questions regarding the current public interest value of these results, given their costs.

51. We observe that some proponents of PTAR suggest that the role of the non-broadcast media should be largely irrelevant in assessing the need for the rule.[88] Is it appropriate to analyze the issue in this manner? When PTAR was promulgated, reliance on the goal of fostering diversity in the broadcast medium exclusively made a good deal of sense because broadcast television was the only widely available outlet through which the public could receive video programming at home; if that form of programming were not diverse, the public would have nowhere else to turn. That is no longer the case today.[89] Accordingly, a diversity-based defense of PTAR would appear to depend on the principle that the Commission should continue to utilize regulatory means to ensure diversity for the remaining 30 percent of the population that relies exclusively on broadcast television for their

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weak independents in larger markets, and UHF independents in general will find it particularly difficult to compete, and some are likely to go dark.").

[88] *See, e.g.*, MAP Comments at 18-23.

[89] We note that Judge Posner observed in *Schurz Communications, Inc. v. FCC, supra* at 1055, that the Commission could have reasonably concluded that its diversity goals do not dictate regulatory action in light of the breadth of available media (broadcast and non-broadcast) today.

programming fare,[90] either out of choice or because of financial limitations.[91]

52. Is PTAR the appropriate mechanism to ensure diversity for this group? As a threshold matter, we seek to gain the appropriate perspective on the fact that a proportion of the public is limited to over-the-air television. At present, 62.5 percent of television households in the United States subscribe to cable, and the percentage of homes passed by cable exceeds 96 percent. An additional 6 percent subscribe to other forms of distribution media. Moreover, our assessment of the trends indicate that by the year 2000, the percentage of the population able to receive non-broadcast video service will reach 100 percent. Given these facts and predictions,[92] it appears that most of the country receives or will soon receive a wide diversity of programming. We ask commenters to address whether the percentage of viewers who are limited to broadcast television has or will become so small that the advantages of eliminating PTAR outweigh its benefits. To assist our review of this issue, we seek commenters' views on how we should treat households to which alternative video delivery systems are available, but which choose not to subscribe. Similarly, we ask commenters to address the impact of existing regulatory measures, such as cable rate regulation, on the availability of subscription video services to those portions of the viewing public that could not otherwise afford to pay.

53. Proponents of PTAR also argue that the broadcasting industry must fulfill unique public service obligations (imposed by the government), which would be more difficult absent a vibrant base of independent stations and a strong supply of diverse programming from non-network sources.[93] Commenters typically cite the broadcasters' obligation to serve their communities of license, and their resulting provision of such programming as public affairs, local news and other locally oriented material. Other video distribution services do not labor under the same regulatory obligations to provide such fare. In order to assess the cogency of these assertions, we seek evidence of the actual levels of such programming on independent stations, network affiliates, and non-broadcast outlets. In other words, the argument appears to assume that broadcasters in fact provide more public interest programming than other services. We ask that parties who rely on this assertion provide data supporting it. If non-

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[90] As set forth in Section IV of this *Notice*, 62.5 percent of TV households in the United States receive cable service, and approximately 6 percent receive other multichannel video service, leaving about 30 percent of the population that relies exclusively on over-the-air broadcast service.

[91] In increasingly smaller numbers, viewers are limited to over-the-air service because of the lack of availability of alternative delivery services.

[92] See Section IV, *supra*, for a detailed description of the current and predicted levels of video service in the United States.

[93] As detailed above, PTAR's proponents have asserted that the competitive benefits received by independent stations, for example, result in greater profits that permit such stations to (a) survive more effectively, and (b) provide more or better "public interest" programming.

broadcast outlets are in fact providing the same or more of this type of service, is PTAR necessary to achieve the goals described in this paragraph? Commenters should also supply data to demonstrate the historical trends. Has the amount of public interest programming carried on broadcast television increased since the passage of PTAR, and how do these trends compare with those for the non-broadcast video media? Has an increase, if any, in the amount of public interest programming by independent stations been offset by a decrease in such programming by the network affiliates? To the extent PTAR harms network affiliates, one might expect a corresponding decrease in such programming. Does the rule, therefore, really create a net increase of such programming presented through the broadcast medium? In addition, commenters who attempt to trace a connection between the competitive benefits of PTAR and an increased output of public interest programming should, at the least, be able to document an industry-wide correspondence between such output and increased profit.

54. Finally, it appears worthwhile to consider whether different regulatory responses than PTAR would be more effective or efficient in achieving the stated goals of that rule. Therefore, in addition to seeking comment on whether we should retain, modify or repeal the rule, the Commission also seeks suggestions on alternatives to PTAR. For example, the rule is intended to promote independent program production. One alternative approach would be for the Commission to establish direct limits on the amount of in-house programming that the networks could distribute to other affiliates. We seek comment on whether this alternative or others could better achieve the goals of PTAR, either in terms of increased effectiveness or lowered costs.

VII. Incidental Elements of the Rule: Definitions and Exemptions

55. *Definition of a Network.* To the extent that the record might support retaining PTAR in whole or part, we believe that review of the current definitions and exemptions associated with the rule is appropriate. For example, under the Commission's current PTAR and fin/syn rules, Fox is not considered a network, and its affiliates are not considered to be network affiliates subject to those rules.[94] In their comments, the Fox Affiliates and others

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[94] For purposes of PTAR, a "network" is any entity (or an entity under common control) regularly providing more than fifteen (15) hours of prime time programming per week (excluding live coverage of *bona fide* news events of national importance) to interconnected affiliates that reach, in aggregate, at least seventy-five (75) percent of television households nationwide. 47 C.F.R. §73.662 (f). That definition excludes any television network formed for the purpose of producing, distributing, or syndicating program material for educational, noncommercial, or public broadcasting exhibition, or for non-English language exhibition, or that predominately distributes programming involving the direct sale of products or services. Further, programming distributed by an entity prior to becoming a network, and subsequently produced episodes of a series first exhibited by that entity prior to becoming a network, are not network programming for purposes of PTAR. Moreover, for thirty-six (36) months after an entity becomes a network, stations owned by or affiliated with that network are exempt from compliance with the requirements of PTAR with respect to programming already under

repeatedly assert that one of the desirable features of PTAR is that while affiliates of the three largest networks in the top 50 markets are subject to PTAR, Fox affiliates are not, and thus are helped by the rule. In contrast, Group W raises questions of fairness, observing that it will become increasingly difficult to distinguish between network affiliates, who are barred from airing popular off-network and new network programming during the prime time access period, and affiliates of new "near" networks, who can secure such programming. Group W also argues that this disparate treatment will appear more and more arbitrary, as major network affiliates switch to "near" networks and are suddenly freed from the constraints of PTAR and allowed to compete more effectively against the remaining network affiliates in the market.[95] Group W, in this regard, states that the safeguards incorporated into the off-network ban are not designed to deal with this phenomenon in a manner equitable to all stations, suggesting that Fox could continue to function as a fully competitive network without ever meeting the definition of a network for purposes of PTAR.[96] With the above in mind, we ask commenters to address whether the current definition of a network continues to be appropriate to define which entities are networks and which stations are network affiliates subject to PTAR.[97]

56. *Exempted Programming.* Although none of the petitioners has specifically raised this issue, we note that there are a number of exemptions to the general three-hour prime-time limit on network or off-network programs that may be aired by network affiliates in the top 50 markets. The specific types of programs include:

> (1) On nights other than Saturdays, network or off-network programs designed for children, public affairs programs or documentary

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contract at the time the entity became a network. 47 C.F.R.. §73.658(k), Notes 3 and 4.

[95] We note that a former affiliate would reap a similar competitive advantage against independent stations and affiliates of new networks as well.

[96] Group W Comments at 3-4.

[97] We note that we recently redefined "network" under both the fin/syn and PTAR rules in the context of our review of the fin/syn rules. We felt that the previous definition would include entities that did not possess the degree of power that prompted us to place restraints on the networks in the first place, and that the definition was discouraging the development of new networks. *See Report and Order* in MM Docket No. 90-162, 6 FCC Rcd at 3149. For similar reasons, and because of the scheduled elimination of the fin/syn rules for the established networks, we decided to exempt emerging networks from virtually all fin/syn constraints no matter how they would ultimately compare with ABC, CBS or NBC. *See, e.g., Second Report and Order* in MM Docket No. 90-162, 8 FCC 2d 3282, 3331-35 (1993). Parties commenting here on the appropriate definition of "network" for PTAR purposes should address the applicability of our fin/syn approach to this definition.

programs;[98]

(2) Special news programs dealing with fast-breaking news events, on-the-spot coverage of news events or other material related to such coverage, and political broadcasts by or on behalf of legally qualified candidates for public office;

(3) Regular network news broadcasts up to a half hour, when immediately adjacent to a full hour of continuous locally produced news or locally produced public affairs programming;

(4) Runovers of live network broadcasts of sporting events, where the event has been reasonably scheduled to conclude before prime time or occupy only a certain amount of prime time, but the event has gone beyond its expected duration due to circumstances not reasonably foreseeable by the networks or under their control;

(5) In the case of stations in the Mountain and Pacific time zones, on evenings when network prime-time programming consists of a sports event or other program broadcast live and simultaneously throughout the contiguous 48 states, such stations may assume that the network's schedule that evening occupies no more of prime time in these time zones than it does in the Eastern and Central time zones; and

(6) Network broadcasts of an international sports event (such as the Olympic Games), New Year's Day college football games, or any other network programming of a special nature other than motion pictures or other sports events, when the network devotes all of its time on the same evening to the same programming, except brief incidental fill material.

57. In specifying the particular categories of exemptions to the three-hour PTAR limit, the Commission intended to safeguard, on policy grounds, existing levels of certain

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[98] For purposes of PTAR, the term "programs designed for children" means programs primarily designed for children aged 2 through 12. The term "documentary programs" means programs which are nonfictional and educational or informational, but not including programs where the information is used as part of a contest among participants in the program, and not including programs relating to the visual entertainment arts (stage, motion pictures or television) where more than 50% of the program is devoted to the presentation of entertainment material itself. The term "public affairs programs" means talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, roundtables, and similar programs primarily concerning local, national, and international public affairs. 47 C.F.R. §73.658(k), Note 2.

types of programs by network affiliates and the networks themselves (*e.g.*, children's programming) or to accommodate scheduling exigencies (*e.g.*, coverage of fast-breaking news events). Therefore, we request that commenters provide any evidence that they may have on PTAR's effects in these regards. Has the existence of these exemptions led to the provision of the same amount of these types of programs than would have existed without the rule? If so, has consumer or viewer welfare been increased by allowing these exemptions, and has it been further increased by the fact that other classes of network and off-network programs are not similarly exempt from PTAR? In sum, we ask commenters to indicate whether these exemptions should be retained, modified or removed, and whether there are any other classes of programs which the public interest suggests should be similarly exempt from PTAR. For example, under the current rule, the Commission protects network and off-network children's programming in the existing access period. Should the Commission extend or modify PTAR to encourage the broadcast of additional children's programming?

VIII. Constitutional Issues

58. Finally, we note that, in light of the policy examinations we are undertaking to determine whether PTAR in its present form should be modified, it may not be necessary to address the specific constitutional questions raised herein. However, if PTAR is retained in part or in whole, it must be done in a manner consistent with constitutional principles. In this regard, we note that the rule has been unsuccessfully challenged as a restraint on free speech contrary to the First Amendment.[99] Regardless of whether its original objectives have been met, the issues now before us necessarily entail determining whether the government retains a justifiable interest in PTAR regulation as it now exists. Thus, parties urging retention of the rule, in part or in whole, should address whether the previous constitutional justifications for PTAR still apply, and should discuss the constitutional implications of any proposed alternative to the present rule. Parties may also wish to address whether and to what extent new and developing technologies have affected the constitutional analysis applicable to regulations of this nature, including whether, in fact, broadcast and non-broadcast program outlets are constitutionally indistinguishable as alleged by First Media and others.

IX. Conclusion

59. Based on the petitions and comments we have received, and in light of significant changes in the video marketplace, it is clear that the time has come to review the Prime Time Access Rule. We have proposed an analytical framework for evaluating the rule, and we anticipate that the data and studies that we have solicited will enable us to determine whether

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[99] *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); *cf. Schurz Communications v. FCC*, 982 F.2d 1043, 1948 (7th Cir. 1992) (upholding constitutionality of fin/syn rules).

the rule should be retained, modified or repealed. However, we invite comment on whether there are alternative frameworks that better allow us to understand the public interest effects of retaining, modifying or repealing PTAR.

60. We invite commenters to tell us whether they believe that PTAR should be retained, modified, or repealed. Those who favor modification of the rule should be clear about the specific modifications that they favor and why they believe these changes would further the public interest.

61. If, as a result of the record developed in this proceeding, the Commission chooses to modify or eliminate the rule, we must then determine when to do so and whether we should adopt transition measures. With regard to when a change in the rule might be appropriate, one possibility is immediately after such a decision is made. Commenters may instead wish to propose a timetable that allows industry participants to adjust to the changing economic conditions that might result from modifications to PTAR. Supporters of this approach should suggest the time frame that they believe would be the most suitable. Alternatively, one might tie the timing of the modification or repeal of PTAR to marketplace developments. For example, such a measure might tie full elimination of the rule to the attainment of a commercial milestone such as having a specified percentage of television households receive broadcast television signals by subscribing to cable television or other multichannel delivery systems; or to the emergence of one or more additional networks. Alternatively, elimination could be tied to technological developments such as the general availability of advanced digital television. Lastly, the timing might be tied to regulatory developments, such as the scheduled expiration of the fin/syn rules or some time thereafter.

62. A transition mechanism could be based on a variety of different considerations. If the Commission adopts a transition, it must define the stages of that transition. Commenters in this proceeding have focused much of the debate thus far on PTAR's off-network restriction. One possible transition would entail initial repeal of the off-network restriction followed by later repeal of the remainder of the rule. We invite comment on whether such a staggered repeal of the rule would further the public interest by reducing marketplace disruption or would delay the realization of benefits that could otherwise be realized from immediate reform. Parties should focus comments in this regard on identifying portions of the rule for which immediate elimination appears least likely to be disruptive and most apt to create positive effects. Moreover, to the extent that a phasing-out of PTAR, in whole or part, is appropriate, we solicit comment on whether it would be wise to adopt here a review and expiration framework similar to that established for the fin/syn rules, or whether some other approach would provide a better safeguard in the transition to scheduled repeal of the rule.[100]

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[100] In the fin/syn proceeding, the Commission decided to phase out those rules in two stages to observe how the market would begin to react to the removal of those long standing constraints. This approach was designed to eliminate those restrictions that appeared least likely to negatively affect diversity and competition, while retaining, but phasing out, other restrictions whose premature elimination held the most risk of harm -- "including significant upheaval and disruption in the industry

63. Another possible transition mechanism would be to limit temporarily the application of PTAR or its components to affiliates in the top 10 or 25 markets. This approach would guarantee first-run syndicated programs access to, for example, the 10 or 25 largest television markets, which now account for 31 and 50 percent, respectively, of all television households (as opposed to the top 50 markets, which represent 67 percent).[101] Under this approach, markets 11-50, or 26-50, would be opened to competition during the prime time access period, and affiliates in those markets would be able to exercise increased programming discretion during the access period. We seek comment generally on this type of interim proposal, and specifically on whether the top 10 or 25 markets are adequate in terms of audience share, advertising revenues and affiliate viewing share to preserve a base of protection for new first-run syndicated programming, should such a base be found necessary.

64. A final type of transition mechanism would be to lift for a specified period the off-network restriction for programming that meets certain conditions. For example, one might exempt from the restriction those programs that have been off-network for more than a certain number of years, allowing older off-network programs to compete with first-run syndicated programs for access to Top 50 Market Affiliates during prime time. This approach could increase competition and allow Top 50 Market Affiliates greater programming discretion, while preserving an access period for first-run syndicated programs in the top 50 markets, possibly increasing the after-market value of network programs and decreasing the risk to producers of high quality network programming.

65. Finally, we take this opportunity to remind parties that, as is the case with any rulemaking proceeding at this stage of the administrative process, the current rule remains in full force and effect.

X. Administrative Matters

66. Ex Parte Rules -- Non-Restricted Proceeding. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission Rules.

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and potentially harmful competitive abuses not unlike those that led to the original imposition of the rule." *See Second Report and Order* in MM Docket No. 90-162, 8 FCC Rcd 3282, 3337 (1983). Moreover, in order to assure as smooth a transition as possible, the Commission stated that it would conduct an inquiry prior to the scheduled expiration of the remaining fin/syn restrictions as an additional safeguard to ensure that the market is operating as anticipated, without unintended and adverse negative consequences. In this regard, the Commission stated that its inquiry would provide an opportunity for comment to those who believe that retention of restriction is warranted, but that the remaining fin/syn restrictions would automatically expire unless the Commission issued an order to the contrary. *Id.* at 3338-42.

[101] 1994 *Broadcasting and Cable Yearbook*, p. c-203-4.

See generally 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

67. Comment Information. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **January 6, 1995**, and reply comments on or before **February 6, 1995**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554.

68. Initial Regulatory Flexibility Analysis. See Appendix B attached.

69. Additional Information. For additional information on this proceeding, contact David E. Horowitz or Alan E. Aronowitz, Mass Media Bureau, (202) 632-7792.

XI. Ordering Clause

70. IT IS THEREFORE ORDERED that the Petition for Rulemakings filed by First Media Corporation and Hubbard Broadcasting, Inc., and the Application for Review filed by Channel 41, Inc. ARE CONSOLIDATED into this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A

The following parties filed comments in response to the FCC's April 12, 1994, *Public Notice*:

Association of Independent Television Stations, Inc. (Comments and Reply Comments)
Bonneville International Corporation
CBS Inc.
The Coalition to Enhance Diversity (Comments and Reply Comments)
First Media, L.P. (Comments and Reply Comments)
FBC Television Affiliates Association
Fox Broadcasting Company[102]
King World Productions, Inc. (Comments and Reply Comments)
Media Access Project (Comments and Reply Comments)
MTM Television Distribution, Inc.
NATPE International
National Broadcasting Company, Inc.
Network Affiliated Stations Alliance
Office of Communications of the United Church of Christ; Black Citizens for a Fair Media; Dr. Everett Parker, Adjunct Professor, Fordham University; Peggy Charren, Visiting Scholar of the Harvard University Graduate School of Education and Founder of Action for Children's Television; and Henry Geller, Communications Fellow, The Markle Foundation
Viacom Inc. (Comments and Reply Comments)
Westinghouse Broadcasting Company, Inc.

The following parties filed *ex parte* submissions which have been associated with this proceeding:

ACI; All American Television, Inc; Central City Productions, Inc.; Claster Television Incorporated; Crescent Entertainment, Inc.; Mark Goodson Productions LP; Kushner-Locke Company; Lee Miller Productions; Loreen Arbus Productions, Inc.; Muller Media, Inc.; Ralph Edwards/Stu Billett Productions; S.I. Communications, Inc.; and Videoware Corporation
Association of Independent Television Stations, Inc.
Buck Owens Production Company, Inc.
Consumer Federation of America
KGW-TV
KHNL(TV)
KING(TV)

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[102] Letter to Chairman Hundt dated June 13, 1994.

KMSP(TV)
KOCB-TV
KOFY(TV)
KOKI-TV
KPLR-TV
KPTV(TV)
KREM-TV
KRLR-TV
KSMO-TV
KTLA(TV)
KTXH-TV
KTXL(TV)
KWGN-TV
LIN Television Corporation
Media Access Project
People for the American Way Action Fund
Post-Newsweek Stations, Inc.
Scripps Howard Broadcasting
The Udwin Group
WBFS-TV
WBSV(TV)
WCIU-TV
WCNC(TV)
WDJT-TV
WGNX(TV)
WGTW-TV
WHAS(TV)
WHNS-TV
WLVI-TV
WOAC(TV)
WPIX, Inc.
WPTY(TV)
WTMV(TV)
WTOG-TV
WTTA-TV
WUTV(TV)
The Walt Disney Studios

Appendix B

Initial Regulatory Flexibility Analysis.

Reason for the Action: This proceeding was initiated to review and update the provisions of PTAR.

Objective of the Action: The actions proposed in this *Notice* are intended to reexamine and perhaps modify or eliminate the prime time access rule, 47 C.F.R. §73.658(k), in response to changes in the communications marketplace, and to better adjust to the needs of the public.

Reporting, Record keeping, and Other Compliance Requirements Inherent in the Proposed Rule: None.

Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule: None.

Description of Potential Impact and Number of Small Entities Involved: Approximately 416 existing television broadcasters of all sizes may be affected by the proposals contained in this Notice.

Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives: The proposals contained in this Notice are meant to simplify and ease the regulatory burden currently placed on network affiliates in the top 50 markets.

As required by § 603 of the Regulatory Flexibility Act, the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rulemaking,* including the IRFA, to the Chief Counsel for Advocacy of Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981)).

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules

This Notice of Proposed Rulemaking reflects a thorough approach to reviewing the merits of the Prime Time Access Rule [PTAR] from various perspectives in the industry. The broadcast and emerging networks, network affiliates, independent television stations, and program producers and syndicator will all have an opportunity to influence the outcome of this docket.

I believe this Notice will track the impact of concurrent industry developments, to include: (1) the potential sunset of our Financial Interest and Syndication Rules in 1995; (2) recent network affiliation changes; (3) recent television station ownership investments, both controlling and non-controlling, and the impact on network affiliation relationships; and (4) the impact of potential modifications to PTAR with respect to independent television station groups and emerging networks. I hope the record in this proceeding will present the Commission with an updated snapshot and projection of industry trends.